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IN THE OFFICE OF THE CLERK

Supreme Court of the United States

OCTOBER TERM, 1996

ANHEUSER-BUSCH, INC. and PENN ADVERTISING OF BALTIMORE, INC.,

Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; CITY COUNCIL OF BALTIMORE CITY; and DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In these cases, which involve First Amendment scrutiny under the *Central Hudson* test, the Fourth Circuit, on remand from this Court, again upheld a municipal zoning ordinance that prohibits placement of outdoor advertisements for alcohol beverages in certain locations for the asserted purpose of reducing illegal underage drinking. The questions presented are:

1. Whether a court fulfills its constitutional duty when it dismisses a First Amendment challenge on a motion under Fed. R. Civ. P. 12(b)(6) thereby (i) failing to conduct an independent review of a city council's legislative findings that are the sole "evidence" proffered to carry the city's burden of proving that its restriction will directly and materially advance its goals in a manner no more extensive than necessary, and (ii) denying plaintiffs any opportunity to contest the city council's findings or submit contrary evidence.

2. Whether this Court's First Amendment decisions in the indecency area have created a "special solicitude" for children that justifies a reduction in a city's burden of proof when its asserted purpose for restricting advertising directed toward adults is said to be the protection of children.

STATEMENT PURSUANT TO RULE 29.6

Anheuser-Busch, Inc. is a Missouri corporation, its parent company is Anheuser-Busch Companies, Inc. and it has no nonwholly owned subsidiaries. Penn Advertising of Baltimore, Inc. is a Delaware corporation, its parent company is Penn Advertising, Inc. and it has no nonwholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

Anheuser-Busch, Inc. and Penn Advertising of Baltimore, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in these consolidated cases.

OPINIONS BELOW

The opinion on remand of the United States Court of Appeals for the Fourth Circuit (App., *infra*, 1a-14a) is reported at 101 F.3d 325 (*"Anheuser-Busch II"*). The

denial of the petition for rehearing and suggestion for rehearing in banc (App., *infra*, 64a-65a) is unreported. The initial opinion of the Fourth Circuit (App., *infra*, 16a-39a), which was readopted on remand, is reported at 63 F.3d 1305 ("*Anheuser-Busch I*"). The opinion of the United States District Court for the District of Maryland (App., *infra*, 40a-63a) is reported at 855 F. Supp. 811.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment on November 13, 1996, and denied the petition for rehearing on December 10, 1996 (App., *infra*, 64a-65a). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND ORDINANCE INVOLVED

The First Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech . . . ."

Article 30, Section 10.01H of the Baltimore City Code provides, in part, that "[n]o person may place any sign, poster, placard, device, graphic display, or any other form of advertising that advertises alcoholic beverages in publicly visible locations." Section 10.01H sets forth eleven exemptions to its general ban on outdoor advertising for alcohol beverages. Article 30, Section 11.0-7 of the Baltimore City Code provides that any violation of Section 10.01H is a misdemeanor punishable by a fine of up to $1,000 a day for every day the violation continues after notification of the violation.[1]

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[1] Article 30, Sections 10.01H and 11.01-7 of the Baltimore City Code (collectively passed as Baltimore Ordinance No. 288) are reproduced in full in the Appendix (App., *infra*, 66a-75a).

STATEMENT

The prior petition in these cases was granted [2] after petitioners urged the Court to resolve a fundamental conflict between its decisions and the Fourth Circuit's application of the *Central Hudson* test. This petition should be granted because, on remand, the Fourth Circuit majority resuscitated that conflict by readopting the decision that had been vacated by this Court after *44 Liquormart*, and then exacerbated that conflict with a new theory that is equally at odds with this Court's First Amendment jurisprudence.

This Court's decisions impose a substantial burden of proof under the fact-based *Central Hudson* test on a government that seeks to restrict commercial speech. Government must prove that its restriction would directly and materially advance its goals in a manner no more extensive than necessary. The Fourth Circuit majority, however, has once again asserted, contrary to *44 Liquormart*, that the constitutionality of Baltimore's ordinance banning certain outdoor advertising for alcohol beverages depends solely on the *reasonableness* of the conclusions drawn by the Baltimore City Council. By proceeding under Fed. R. Civ. P. 12(b)(6), the majority again precluded the development in court of an evidentiary record on which the district court and the Fourth Circuit could have made independent findings of fact. Instead, the dismissal of petitioners' complaints was once again upheld based solely on the majority's continuing deference to the Baltimore City Council's untested legislative conclusions. The readopted decision continues to raise profound questions regarding the role of the judicial branch under the First Amendment and the procedural and substantive standards to be applied by courts in assessing commercial speech restrictions.

On remand, the majority also added another layer of conflict with this Court's decisions by, in effect, creating

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[2] App., *infra*, 15a (granting petition, vacating judgment and remanding for further consideration in light of this Court's decision in *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996)).

a new sub-category of speech that receives reduced First Amendment protection. According to the majority, this Court's decisions in the indecency area require the judiciary to give "special solicitude" to a government that claims to be restricting speech for the purpose of protecting children. But this Court has never allowed a government's asserted interest in the protection of children to diminish its First Amendment burden of proof. This additional conflict has grave implications for all speech protected by the First Amendment and should be resolved by this Court.

A. Petitioners and the Baltimore Ordinance's Restriction on Their Commercial Speech

Anheuser-Busch, Inc. ("Anheuser-Busch") is a manufacturer and distributor of alcohol and non-alcohol malt beverages. App., *infra*, 83a. To promote the sale of its brands of beer, Anheuser-Busch engages in truthful and non-misleading advertising of its products in the various media in Baltimore, including dozens of outdoor billboards and freestanding signboards. *Id.* at 84a. In its advertising, Anheuser-Busch adheres to the beer industry's self-imposed, voluntary guidelines designed to ensure that beer advertisements do not target minors, and frequently presents public service messages designed to promote responsible consumption or address such problems as underage drinking. *Id.* at 85a.

Penn Advertising of Baltimore, Inc. ("Penn") is engaged in the business of outdoor advertising on signs located throughout Baltimore. *Id.* at 98a. Penn leases land from private property owners, erects and maintains sign structures on that land, and makes the sign structures available to its customers, including alcohol beverage producers. *Id.* All of the advertisements carried by Penn are truthful and nonmisleading. *Id.*

On January 6, 1994, Baltimore enacted Article 30, Section 10.01H of the Baltimore City Code (the "Ordinance")—an amendment to its zoning law—which bans,

with numerous exemptions, outdoor advertising for alcohol beverages in most of Baltimore's zoning districts. *Id.* at 101a. The asserted purpose of the Ordinance is to reduce illegal underage drinking in Baltimore. JA1098.[3] The Ordinance specifically exempts from regulation neon or other electric signs in the windows of premises licensed to sell alcohol, generic signs, signs on the hundreds of MTA buses, alcohol beverage delivery trucks and taxicabs that traverse Baltimore, signs at Memorial Stadium and Camden Yards baseball stadium, signs on property adjacent to interstate highways, signs in Baltimore's central business district and, subject to certain setback provisions, signs in one designated industrial zone. App., *infra*, 73a-74a. Baltimore subsequently enacted an additional exemption to the Ordinance that allows the retail alcohol beverage outlets located throughout the city's neighborhoods to display alcohol beverage advertisements on large portions of their exterior surfaces. *Id.* at 76a-79a. In addition to its exemptions, the Ordinance does not limit in any way the other advertising media used for alcohol beverages and to which minors are regularly exposed, *i.e.*, television, radio, newspapers, and magazines.

B. The District Court Proceedings

Shortly before the Ordinance became effective, petitioners commenced separate lawsuits in the United States District Court for the District of Maryland, invoking the jurisdiction of the district court under 28 U.S.C. §§ 1331, 1332 and 1343. Among other things, petitioners sought, and still seek, a declaratory judgment that the Ordinance violates their commercial speech rights protected by the First Amendment and an injunction against enforcement of the Ordinance.[4] Soon after commencing their actions,

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[3] The designation "JA——" refers to the joint appendix filed in the Fourth Circuit.

[4] The Fourth Circuit majority, by readopting *Anheuser-Busch I*, perpetuates an incorrect and inexplicable characterization of petitioners' complaints as raising only facial and not as-applied chal-

petitioners each filed a motion for a preliminary injunction against enforcement of the Ordinance. On those motions, petitioners submitted substantial evidence to show that Baltimore was not likely to meet its burden under the *Central Hudson* test to prove that a ban on some, but not all, outdoor advertising for alcohol beverages will directly and materially reduce underage consumption. App., *infra,* 119a-135a; JA103-795, JA1055-1084. While the preliminary injunction motions were pending, Baltimore filed motions to dismiss both actions under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Without notice to the parties, the district court converted Baltimore's motions to dismiss to summary judgment motions and granted them. Notwithstanding the detailed evidence submitted by petitioners on their preliminary injunction applications and the issues of fact they created, the court interpreted the *Central Hudson* test as requiring it to give binding deference to the Baltimore City Council's conclusion that the Ordinance would achieve its goal. *App., infra,* 52a, 54a.

C. The Fourth Circuit's Initial Decision (*Anheuser-Busch I*) [5]

The Fourth Circuit affirmed the district court's judgment, but did so in the context of Baltimore's motions to

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lenges to the Ordinance. In fact, the complaints explicitly seek relief on both grounds and contain more than sufficient allegations to support as-applied challenges. App., *infra,* 90a, 93a-94a, 98a, 106a, 115a-116a. The complaints allege that petitioners currently place alcohol beverage advertising on billboards in Baltimore, that they intend to continue such advertisements, and that such advertisements will violate the Ordinance if it is not invalidated. *Id.* at 90a, 98a, 106a; *see, e.g., Edenfield v. Fane,* 507 U.S. 761, 764 (1993); *Schwartz v. Welch,* 890 F. Supp. 565, 570-71 (S.D. Miss. 1995) (explaining that this Court does not require a plaintiff to be prosecuted before filing an as-applied challenge).

[5] The Fourth Circuit's initial decision will be described in detail in view of the panel majority's readoption of it following this Court's remand.

dismiss under Rule 12(b)(6). *Id.* at 27a. The Fourth Circuit ruled that the conversion to summary judgment was unnecessary because the district court could have applied the *Central Hudson* test without looking beyond the complaints and the Ordinance's legislative history. *Id.* Proceeding under Rule 12(b)(6), the Fourth Circuit disregarded the issues created by the evidence proffered by petitioners on their preliminary injunction motions.

The Fourth Circuit also did not consider itself bound to accept as true the well-pleaded allegations of the complaints on Baltimore's motions to dismiss. To the contrary, the Fourth Circuit believed that, regardless of a plaintiff's allegations, a court may not subject legislative "findings" that purportedly satisfy the *Central Hudson* test to "judicial review under a clearly erroneous standard or otherwise." *Id.* at 26a. The Fourth Circuit's refusal to engage in judicial review meant that Baltimore irrebuttably met its *Central Hudson* burden of proof by "pointing to the enactment itself and its legislative history." *Id.* In the court's view, "these are 'legislative facts,' the substance of which cannot be trumped by the fact finding apparatus of a single court." *Id.* (citation omitted). The Fourth Circuit stated that any judicial review of legislative "findings" would be an error because it "would ignore the structural separation between legislative bodies and courts and would improperly subordinate one branch to the other." *Id.* Petitioners thus were deprived of any opportunity to test the evidence considered by the Baltimore City Council or to submit contrary evidence.

The Fourth Circuit then turned to application of the four-prong *Central Hudson* test. There was no dispute under the first or second prong, as the parties agreed that petitioners' advertisements are not misleading and concern lawful activity, and that Baltimore has a substantial interest in reducing illegal underage consumption of alcohol beverages. *Id.* at 28a.

The Fourth Circuit interpreted the third prong as seeking "to elicit whether it was reasonable for the legislative body to conclude that its goal would be advanced in some material respect" by its restriction on speech. *Id.* at 29a. The court stated that the government need only show a "logical nexus" between its restriction and goal, and that it is not required "to prove conclusively that the correlation in fact exists." *Id.* at 29a, 31a.

In finding that the third prong was satisfied, the Fourth Circuit explicitly deferred to the Baltimore City Council's "legislative finding that the majority of research studies show a definite correlation between alcoholic beverage advertising and underage drinking." *Id.* at 31a. The court made no assessment of the relevance or reliability of Baltimore's research studies, disregarding an expert affidavit submitted on Anheuser-Busch's preliminary injunction motion which demonstrated that Baltimore had completely failed to acknowledge most of the reliable scientific evidence on this issue. JA175-76. Moreover, the court acknowledged that the numerous studies attached to that expert affidavit, including a study conducted by the Federal Trade Commission in 1985, "refute a correlation between alcoholic beverage advertising and underage drinking," but still did not question Baltimore's assertions. App., *infra*, 24a.

The Fourth Circuit also failed to analyze petitioners' argument that, even if frequent exposure to alcohol beverage advertising could cause an increase in underage consumption (which reliable evidence shows it does not), the Ordinance would be ineffective because in practice it would reduce exposure by an insignificant amount. The court did not require or have before it any evidence as to the Ordinance's actual impact on the exposure of minors to alcohol beverage advertising, given its many exemptions and inapplicability to any other medium.

The Fourth Circuit next addressed the fourth prong of *Central Hudson*, which requires a restriction on speech

to be "no more extensive than is necessary" to serve the stated governmental interest. *Id.* at 33a. The court acknowledged that the Ordinance "reduce[s] the opportunities for adults to receive advertised information," and that "adults, who constitute a majority of the population, are not the object of the government's legislation." *Id.* at 34a. But the court found that Baltimore had no burden to explain its rejection of the two obvious alternatives with no adverse impact on speech that were identified by petitioners: increasing enforcement of existing Maryland laws prohibiting sales to, and possession of alcohol beverages by, minors; and implementing and encouraging educational programs about risks associated with alcohol consumption. *Id.* at 34a-35a. Even though the Fourth Circuit admitted that "those approaches might indeed prove beneficial in reducing underage drinking," it concluded that Baltimore's decision to restrict outdoor advertising to achieve its goal, instead of an approach with no impact on speech rights, was beyond judicial review. *Id.* at 34a.

Petitioners applied to this Court for a writ of certiorari on October 27, 1995. After the petition was filed, the Court issued its judgment in *44 Liquormart*, unanimously invalidating Rhode Island's ban on off-premise price advertising for alcohol beverages. Eight members of the Court squarely rejected the notion—arising largely from its decade-old decision in *Posadas*[6]—that government can satisfy *Central Hudson* based on the ostensible "reasonableness" of a legislative restriction on commercial speech. 116 S. Ct. at 1511 (Stevens, J.); *id.* at 1522 (O'Connor, J.). One week later, the Court granted the petition, vacated the Fourth Circuit's judgment, and remanded the cases for further consideration in light of *44 Liquormart*. App., *infra*, 15a.

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[6] *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986).

D. The Fourth Circuit's Decision on Remand (*Anheuser-Busch II*)

On remand, the previously unanimous panel split. The majority "readopted" the vacated opinion in *Anheuser-Busch I* because it believed, despite this Court's remand, that the *44 Liquormart* decision was too fragmented to shed any light on commercial speech cases other than those involving price advertising for alcohol beverages. App., *infra*, 5a-6a. The sole change made by the majority to *Anheuser-Busch I* was the mechanical deletion of all citations to *Posadas* "in view of the doubt placed on that opinion by a majority of the Court in *44 Liquormart*." *Id.* at 3a n.*. Thus, the majority left intact the highly deferential approach to commercial speech restrictions set forth in *Anheuser-Busch I*, even though that approach had been premised on the now-deleted citations to *Posadas*. *Id.* at 30a-32a, 35a.

The majority attempted to bolster its deferential approach with a new justification that had not been raised in *Anheuser-Busch I*. According to the majority, courts must apply reduced First Amendment scrutiny when a government asserts that its restriction on speech serves a goal related to the protection of children. The majority attributed that rule to five of this Court's decisions, which it characterized as holding that "children deserve *special solicitude* in the First Amendment balance because they lack the ability to assess and analyze fully the information presented through commercial media." *Id.* at 8a (emphasis supplied). All five of those decisions arose in the indecency context and none involved commercial speech.[7] *Id.* at 8a-9a. The majority closed its opinion with the assertion that its upholding of the Ordinance was "in accord with an unbroken chain of Supreme Court

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[7] *Denver Area Educ. Telecomms. Consortium, Inc. v. F.C.C.*, 116 S. Ct. 2374 (1996); *Osborne v. Ohio*, 495 U.S. 103 (1990) (child pornography); *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography); *F.C.C. v. Pacifica Fdn.*, 438 U.S. 726 (1978); *Ginsberg v. New York*, 390 U.S. 629 (1968).

cases which indicate its desire to ensure that children do not become lost in the marketplace of ideas." *Id.* at 9a-10a.[8]

In dissent, Judge Butzner rejected the majority's deferential approach to the Baltimore City Council's decision to restrict speech, notwithstanding his "wholehearted[]" agreement with the legislative goal of protecting children. *Id.* at 11a. Unlike the majority, Judge Butzner understood *44 Liquormart* to stand for the principle that the courts may not rely on legislative findings to determine whether a restriction on commercial speech infringes the First Amendment, but must independently examine the evidence presented by the parties in a judicial proceeding:

> A charge that advertising restrictions infringe rights guaranteed by the First Amendment requires careful evaluation assessing the credibility of witnesses and weighing the evidence. These functions should be performed by a judge—not by a city council. *See 44 Liquormart*, 116 S. Ct. at 1511 (Stevens, J., concurring in the judgment). The court should base its evaluation of the case on the facts underlying the dispute and the reasonable inferences drawn from those facts rather than the version of the facts that appears in the allegations and legislative findings. By affirming the district court's judgment without adducing and examining the facts, a reviewing court en-

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[8] The majority mentioned in passing another new theory for upholding Baltimore's restriction on alcohol beverage advertisements—that the Ordinance "merely restricts the time, place and manner of such advertisements." App., *infra*, 7a. The majority did not state whether this characterization caused it to reduce its scrutiny of the Ordinance. Nor did the majority explain how the Ordinance could possibly meet this Court's requirement that "time, place, manner" restrictions be content-neutral, in light of the fact that the Ordinance expressly applies only to speech with a specific content—the advertisement of alcohol beverages. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428-429 (1993).

gages in the type of deferential review that *44 Liquormart* deems improper.

Id. at 14a. Judge Butzner concluded that, in light of *44 Liquormart*, dismissal of these cases under Rule 12(b)(6) was error and the cases should have been remanded to the district court for the development of an evidentiary record as a basis for independent judicial review. *Id.*

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT'S HOLDING THAT THE JUDICIARY MAY NOT REVIEW LEGISLATIVE "PROOF" THAT PURPORTEDLY JUSTIFIES A RESTRICTION ON COMMERCIAL SPEECH RIGHTS CONFLICTS DIRECTLY WITH THIS COURT'S DECISIONS

In startling conflict with this Court's decisions, the majority of the Fourth Circuit panel has virtually eliminated the judiciary's role in the system of checks and balances necessary to protect First Amendment rights from impermissible legislative restrictions. The majority held that the courts are not permitted under its view of "separation of powers" principles to subject a government's "proof" that purportedly justifies a restriction on First Amendment rights to *any* judicial review. But this Court has made it plain that, when a restriction on commercial speech is challenged, courts must carefully review an adversarial evidentiary record to determine whether the government has satisfied its burden of proof under the four-prong *Central Hudson* test. If the Fourth Circuit majority is right, then all of this Court's decisions that have required independent judicial scrutiny of the facts in the record and subsequently rejected a government's asserted justification for restricting commercial speech must be wrong. *See, e.g., 44 Liquormart*, 116 S. Ct. 1495; *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995); *Ibanez v. Florida Dep't of Bus. & Prof. Reg.*, 114 S. Ct. 2084 (1994); *Discovery Network*, 507 U.S. 410;

Edenfield, 507 U.S. 761; *see also Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2378 (1995) (noting that courts must "scour[] the record" in a commercial speech case).

Most recently, *44 Liquormart* restated in the strongest terms yet that courts cannot, consistent with the First Amendment, simply defer to a government that seeks to restrict commercial speech. As the panel here did in *Anheuser-Busch I*, the First Circuit in *44 Liquormart* had applied a deferential approach based in large part on *Posadas*. *44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 5, 6-7 (1st Cir. 1994), *rev'd*, 116 S. Ct. 1495 (1996). In reversing the First Circuit, Justice Stevens, writing on behalf of four Justices, rejected as erroneous the "highly deferential approach" of *Posadas*. 116 S. Ct. at 1511. Similarly, Justice O'Connor, writing on behalf of another four Justices, emphasized that the Court in cases decided after *Posadas* has examined "more searchingly [government's] professed goal, and the speech restriction put in place to further it, before accepting [government's] claim that the speech restriction satisfies First Amendment scrutiny." *Id.* at 1522.[9]

The majority's *Central Hudson* analysis directly conflicts with this Court's rejection of uncritical deference to a government that restricts First Amendment rights. According to the majority's readopted opinion, a court applying *Central Hudson* may not "subject legislative findings

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[9] In supposed response to these passages from *44 Liquormart*, the majority simply deleted the extensive citations to *Posadas* in *Anheuser-Busch I*, but did not change one word of its analysis. According to the majority, *Posadas* was not "necessary" to its holding "[b]ecause we do not defer blindly to the legislative rationale, but rather agree with it based on our own independent conclusion . . . ." App., *infra*, 3a n.*. It is *not possible*, however, that the majority engaged in the independent review of the evidence required by *44 Liquormart* because, twice now, it has precluded the development of an evidentiary record and there was no evidence to review.

themselves to judicial review under a clearly erroneous standard or otherwise," and may not act as finder of fact to "trump" the "legislative facts" that the sponsors of a restriction on speech insert in its legislative history.[10] *Id.* at 26a. This overarching conflict between the majority's decision and this Court's decisions is exemplified by three specific aspects of the Fourth Circuit's application of *Central Hudson*: its use of a Rule 12(b)(6) motion to decide a First Amendment commercial speech case; its interpretation and application of *Central Hudson*'s third prong; and its interpretation and application of the fourth prong.

A. The Dismissal under Rule 12(b)(6)

The Fourth Circuit majority's readoption of dismissal under Rule 12(b)(6) cannot be reconciled with this Court's placement of the burden of proof to satisfy the fact-based *Central Hudson* test squarely on the government—the defendant in commercial speech challenges. *See Ibanez*, 114 S. Ct. at 2089 (describing the government's burden as "not slight"). Even if the government can make a *prima facie* showing under the third and

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[10] The danger of the majority's complete deference to the conclusions of Baltimore's City Council is underscored by the statistic that the vast majority of governmental units—84,945 of a total 85,006 in 1992—operate at the local level, *i.e.*, county, city, town and various other local boards and commissions. U.S. Dep't of Commerce, *Statistical Abstract of the U.S.* 295 (116th ed. 1996). The individuals who legislate at the local level often do so only part-time and may lack the means to engage in thorough fact-finding. Further, because their communities are relatively homogeneous, local legislators may be particularly susceptible to majoritarian demands to squelch disfavored or unpopular speech. *See, e.g.*, *City of Ladue v. Gilleo*, 512 U.S. 43 (1994). Under the majority's decision, speakers whose rights are being restricted will have no meaningful recourse to the courts from a local legislature's ill-considered conclusion that facts exist to justify a restriction on commercial speech rather than alternatives to achieving its goal with no or less impact on speech.

fourth prongs, it is critically important to the protection of First Amendment rights that the plaintiff be given an opportunity to test the government's proof and to refute its initial showing with contrary evidence. The proof requirements imposed by this Court on a government under *Central Hudson* are antithetical to dismissal of a well-pleaded complaint on a Rule 12(b)(6) motion.

This Court's consistent practice—ignored by the Fourth Circuit majority—has been to decide commercial speech cases based on the factual record developed in the trial court, including evidence submitted by the plaintiff. *See Edenfield*, 507 U.S. at 770-76 (invalidating a ban on in-person solicitation by CPAs after considering plaintiff's submissions of an affidavit, scholarly literature and professional publications); *Discovery Network*, 507 U.S. at 416-19 (invalidating a ban on newsracks distributing commercial handbills after considering plaintiff's evidence of the percentage of total newsracks actually affected); *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 431-33 (1993) (upholding a ban on certain broadcast advertising, but only after considering the detailed record evidence concerning the ban's actual impact).

In the absence of a developed evidentiary record on the factual inquiries required under *Central Hudson*, the government cannot overcome the strong constitutional presumption against censorship. *See 44 Liquormart*, 116 S. Ct. at 1509 (Stevens, J.) (concluding that Rhode Island failed the third prong because there were no "findings of fact or indeed any evidentiary support whatsoever . . . that the price advertising ban will significantly advance the State's interest in promoting temperance"). The burden shifts to the challengers of a restriction on speech only *after* the government has made a *prima facie* showing. For example, the Court's decision in *Florida Bar* hinges on the failure of plaintiffs to submit any evidence to the trial court that contradicted the Bar's submissions. *Florida Bar*, 115 S. Ct. at 2378 (stating that plaintiffs "at

no time refuted" the Florida Bar's showing); *id.* at 2380 (stating that plaintiffs did not "point[] to" any contrary evidence); *id.* at 2381 (stating that the Bar's study was "unrebutted by respondents below").

Contrary to this Court's decisions, the Fourth Circuit's Rule 12(b)(6) approach transforms the untested, self-serving assertions in the legislative "history" of a local ordinance banning speech based on its content into an irrebuttable presumption of constitutionality. This approach impermissibly involves even less judicial scrutiny than the deferential *Posadas* approach rejected in *44 Liquormart*. The Fourth Circuit's reliance on Rule 12(b)(6) makes a mockery of this Court's repeated imposition of the burden of proof on the government, and strips the *Central Hudson* test of its power to protect valuable First Amendment rights through independent judicial oversight and review.

B. The Third Prong: Direct and Material Advancement

The Fourth Circuit's treatment of the fact-intensive third prong of *Central Hudson* is clearly in conflict with this Court's decisions. Under the *Edenfield* standard for the third prong, this Court requires a government to "*demonstrate* that the harms it recites are real and that its restriction will *in fact* alleviate them to a material degree." *Rubin*, 115 S. Ct. at 1592 (emphasis supplied; citation omitted); *see Florida Bar*, 115 S. Ct. at 2383-84; *Ibanez*, 114 S. Ct. at 2088-89; *Edenfield*, 507 U.S. at 770-71. This evidentiary standard cannot be met by government's assertedly "reasonable" belief that its restriction on speech will be effective. *See 44 Liquormart*, 116 S. Ct. at 1511 (Stevens, J.) (rejecting Rhode Island's argument, accepted by the First Circuit, that it only needed to show that its price advertising ban was a "reasonable choice"); *id.* at 1522 (O'Connor, J.) (stating that the courts may not accept legislative assertions as "reasonable, without further inquiry").

The majority defied this Court's teachings, including the just-quoted statements for eight Justices in *44 Liquormart*—the specific case that the Fourth Circuit was directed to consider on remand. The majority described the inquiry under the third prong as "whether it was *reasonable* for the legislative body to conclude that its goal would be advanced in some material respect by the regulation." App., *infra*, 29a (emphasis supplied). Baltimore was never required to prove that its Ordinance would in fact directly and materially reduce underage drinking. Rather, the majority found that the third prong had been satisfied because of the purported "reasonableness of [Baltimore's] belief that the means it selected will advance its ends." *Id.* at 32a; *see id.* at 4a.

Against the backdrop of this Court's decisions, the Fourth Circuit majority's reasoning is inexplicable. Perhaps the majority returned to the discredited "reasonableness" formulation because the "record" on these Rule 12(b)(6) motions, which consists solely of the Ordinance's legislative history, could not possibly satisfy the *Edenfield* standard of proof for the third prong. For example, the record lacks *any* evidence of the actual impact that the Ordinance will have on the exposure of Baltimore's minors to alcohol beverage advertising. Such evidence is especially critical in light of the numerous exemptions to the Ordinance, its lack of application to any medium other than outdoor signage, and Baltimore's later enacted exemption for signs on the exterior surfaces of retail alcohol beverage outlets.[11] Moreover, the record

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[11] If the majority had not precluded petitioners from developing an evidentiary record, they would have taken discovery to determine, *inter alia*, the actual impact of the Ordinance on the types and number of alcohol beverage advertisements that minors in Baltimore will continue to encounter (1) in the windows and on the exterior walls of the more than 1,500 retail establishments located throughout Baltimore's neighborhoods, JA108, (2) in Camden Yards baseball park and Memorial Stadium, (3) on the MTA buses that are used to transport thousands of minors to school, App., *infra*, 138a, (4) on the alcohol beverage delivery trucks and

contains no trial testimony on the threshold issue of whether advertising, rather than parental, peer and other social influences, is a material cause of illegal underage drinking. The need for such testimony is underscored by a study prepared by the Federal Trade Commission in 1985, which finds that there is "no reliable evidence to conclude that alcohol advertising significantly affects consumption." JA263.

Rather than require the parties to develop an evidentiary record, the majority found that Baltimore carried its burden of justifying the Ordinance merely "by pointing to the enactment itself and its legislative history." App., *infra*, 26a. But this Court's "cases require something more than a few pages of self-serving and unsupported statements by the [government] to demonstrate that a regulation directly and materially advances the elimination of a real harm when the [government] seeks to suppress truthful and nondeceptive speech." *Florida Bar*, 115 S. Ct. at 2384 (Kennedy, J., dissenting); *see Rubin*, 115 S. Ct. at 1593 (holding that the government did not satisfy the third prong when it failed to submit *convincing* evidence).

The majority's constricted interpretation of its proper role under the third prong also conflicts with this Court's

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1,055 taxicabs that traverse the City, JA108-09, (5) on television and radio, and (6) in magazines, newspapers and other publications. The importance of such evidence in commercial speech cases is demonstrated by *Discovery Network*, where this Court invalidated a Cincinnati ban on commercial newsracks that was passed for the asserted purpose of promoting urban aesthetics. 507 U.S. at 418. Based on a fully developed record of the sort that petitioners would have developed here, the Court found that the ban was ineffective and failed the *Central Hudson* test because its net effect was to remove only 62 newsracks, while about 1,500-2,000 remained on the streets. *Id.* at 417-18; *see Rubin*, 115 S. Ct. at 1593 (holding that third prong was not satisfied due to "exemptions and inconsistencies" in regulatory scheme that rendered it ineffective); *Valley Broadcasting Co. v. United States*, 1997 WL 76254 (9th Cir. Feb. 25, 1997) (same).

delineation of a court's duties under the Federal Rules of Evidence. The majority refused to make any determination of the relevance and reliability of the social science reports referred to in the preamble to the Ordinance which were cited in Baltimore's motions to dismiss as its "proof" under the third prong. This Court held, however, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993), that under the Federal Rules of Evidence the courts "must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." Not surprisingly, the majority's refusal to fulfill its "gatekeeping" obligation under the Rules resulted in a decision based on "evidence" that petitioners had no opportunity to rebut and which a trial would show to be unreliable and contrary to the mainstream of peer-reviewed scientific analysis. *See, supra,* at 8. Because of the importance of First Amendment rights, the duties imposed by the Rules of Evidence on federal courts applying the *Central Hudson* test must be at least as rigorous as *Daubert* imposed in the trial of a tort case. *Cf. New York Times Co. v. Sullivan,* 376 U.S. 254, 279-80 (1964) (establishing clear and convincing standard in "public figure" libel context).

C. The Fourth Prong: No More Extensive Than Necessary

The majority's refusal to engage in judicial review of Baltimore's asserted justification for banning speech also led to a conflict with this Court's application of the fourth prong of *Central Hudson,* which requires a government to show that its restriction on speech is "no more extensive than necessary to serve [the asserted] interest." *Ibanez,* 114 S. Ct. at 2088. This Court has held repeatedly that the fourth prong is not met if there are "obvious less-burdensome alternatives to the restriction on commercial speech." *Discovery Network,* 507 U.S. at 417 n.13; *see 44 Liquormart,* 116 S. Ct. at 1510 (Stevens, J.); *id.* at 1519-20 (Thomas, J.); *id.* at 1521-22 (O'Connor, J.); *Florida Bar,* 115 S. Ct. at 2380; *Rubin,* 115 S. Ct. at 1593-94.

The majority's decision directly conflicts with *44 Liquormart, Discovery Network, Florida Bar* and *Rubin* by refusing to review Baltimore's failure to consider "obvious less-burdensome alternatives" to its restriction on outdoor advertising. According to the majority, "it is not an acceptable response to the approach taken by the City of limiting advertising exposure to say that the City must abandon altogether an approach that directly advances its goal." App., *infra*, 35a. The majority's decision clashes most starkly with this Court's conclusion in *44 Liquormart* that the fourth prong was not satisfied because, like Baltimore here, Rhode Island had not first attempted to reduce abusive drinking by adopting the alternatives of educational programs and limiting access to alcohol beverages. 116 S. Ct. at 1510 (Stevens, J.); *id.* at 1522 (O'Connor, J.).

Yet, the majority itself recognized that the two non-speech-related alternatives identified by petitioners—educational programs and better law enforcement to limit illegal underage access—"might indeed prove beneficial in reducing underage drinking . . . ." App., *infra*, 34a. The majority also expressed concern about the breadth of the Ordinance's ban because it reduces the opportunities for alcohol beverage marketers to communicate with adults, who obviously are not the object of Baltimore's concern about underage drinking. *Id.*; *see Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73-74 (1983) (invalidating ban on the mailing of unsolicited advertisements for contraceptives because the "government may not 'reduce the adult population . . . to reading only what is fit for children.'" (citation omitted)). Nevertheless, the majority deemed these entirely feasible alternatives to the Ordinance—which not only would impose no restriction on communication with adults but would in no way intrude on protected speech—irrelevant under the fourth prong, choosing to defer once again to the legislature's selection of a restriction on speech. App., *infra*, 36a-37a.

The majority also failed to hold Baltimore to its burden under the fourth prong of demonstrating that the Ordinance is "narrowly tailored." *See Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). That failure cannot be reconciled with this Court's decision in *Discovery Network*, which involved a similarly underinclusive restriction on speech. 507 U.S. 410. There, Cincinnati ostensibly sought to promote its interest in safety and aesthetics by banning newsracks used to distribute commercial fliers, but it permitted newsracks for newspapers. The Court invalidated the ban because the disparate treatment of the two types of newsracks "bears no relationship *whatsoever* to the particular interests that the city has asserted." *Id.* at 424 (emphasis in original). In contrast, the majority here did not require any proof from Baltimore as to how its disparate treatment of various types of outdoor advertisements for alcohol beverages bears any relationship to its asserted interest in reducing underage drinking. The record contains no evidence as to how Baltimore's asserted interest could be served by banning advertisements in certain locations, while exempting numerous other locations, such as advertisements on the MTA buses that transport thousands of Baltimore's minors to school, on the exterior surfaces of the more than 1,500 retail estiblishments located throughout Baltimore's neighborhoods, and in Camden Yards baseball stadium. *See, supra,* at 17-18 n.11. The Fourth Circuit majority's refusal to allow the development of any record evidence on the "narrow tailoring" requirement cannot be squared with, *inter alia, Discovery Network*.

II. THE FOURTH CIRCUIT'S ASSUMPTION THAT A GOVERNMENT'S BURDEN TO JUSTIFY A RESTRICTION ON SPEECH IS REDUCED WHEN ITS ASSERTED GOAL RELATES TO THE PROTECTION OF CHILDREN ALSO CONFLICTS DIRECTLY WITH THIS COURT'S DECISIONS

Faced with this Court's instruction to reconsider these cases in light of *44 Liquormart*, the Fourth Circuit ma-

jority evaded that responsibility by creating a new justification for upholding the Ordinance. According to the majority, the courts should apply reduced First Amendment scrutiny when a government asserts that its restriction on speech is necessary to protect children. App., *infra*, 8a. This rule of "special solicitude" for children, in the majority's view, is mandated by this Court's decisions in the indecency context. *Id.* at 8a-9a. But this Court has stated repeatedly and invariably that a legislature's asserted interest in protecting children cannot dilute the First Amendment scrutiny applicable to a restriction on speech. *See Sable Comms. of Calif., Inc. v. F.C.C.*, 492 U.S. 115 (1989); *Bolger*, 463 U.S. 60; *Butler v. Michigan*, 352 U.S. 380 (1957). Indeed, that principle was applied in *Sable* to invalidate a restriction on indecent speech—the very area of First Amendment law that the Fourth Circuit majority relied on as purportedly supporting its "special solicitude" theory.[12]

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[12] Even if a rule of "special solicitude" did apply in the indecency context, that rule should not be applied in these cases because of two dissimilar issues of proof raised by restrictions on indecent speech and commercial speech. First, whenever a content-based restriction on speech is challenged, the government must show that the speech in question actually causes the asserted harm and that its restriction will alleviate that harm. Would-be censors of indecent speech argue, and many agree, that such speech harms immature minors immediately upon exposure. In contrast, even the opponents of alcohol beverage advertising cannot demonstrate any immediate impact on minors, so they routinely assert an attenuated and unproven chain of presumptions. Second, the deep differences between indecency and commercial speech are also critical to the First Amendment inquiry concerning the availability of non-speech-related alternatives to advance the government's purpose. Whereas the harm purportedly caused by indecent speech could perhaps most directly be addressed by restricting children's access to the immediately impactive speech itself, the harm purportedly caused by alcohol beverage advertising would be much more directly addressed by reducing underage access to, and consumption of, these products, through alternatives such as better law enforcement, education and parental supervision.

At issue in *Sable* was a federal ban on, *inter alia*, indecent commercial telephone messages, commonly known as "dial-a-porn." After recognizing the government's compelling interest in protecting children, the Court made plain that this interest cannot diminish the free speech rights of adults:

> The Government may serve this legitimate interest, but to withstand constitutional scrutiny, "it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms. . . ." It is not enough to show that the Government's ends are compelling; the means must be narrowly tailored to achieve those ends.

492 U.S. at 126 (citations omitted).

Closer to home, the Court in *Bolger* rejected the argument that the commercial speech rights of adults can be reduced to protect children. The Court struck down a federal statute that prohibited the mailing of unsolicited advertisements for contraceptives. 463 U.S. at 73-74. In language that is equally applicable here, the Court held that the "government may not 'reduce the adult population . . . to reading only what is fit for children.'" *Id.* (citation omitted).[13]

In its bold evasion of this Court's decisions, the Fourth Circuit majority now opines that the government may avoid its full First Amendment burden of proof merely by asserting the protection of children as its purpose for censorship. But the protections afforded by the First Amendment cannot vary according to the attractiveness of the

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[13] This Court's refusal to reduce First Amendment scrutiny when government claims to be acting *in loco parentis* is supported by its long-standing recognition that the constitution entrusts parents, not government, with the right and primary duty of supervising the education and intellectual maturation of their children. *See, e.g., Pierce v. Society of Sisters of Holy Names of Jesus and Mary*, 268 U.S. 510, 534-35 (1925); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 708 (1977); *Parham v. J. R.*, 442 U.S. 584, 602 (1979).

government's asserted purpose. Members of this Court often quote the warning of Justice Brandeis that "[e]xperience should teach us to be most on guard to protect liberty when the Government's purposes are beneficent." *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting). Judge Butzner, in dissent, understood that principle, and declined to allow his "wholehearted[]" agreement with Baltimore's asserted goal to blind him to this Court's requirement that "factual records" must be developed to answer the third and fourth inquiries of *Central Hudson*. App., *infra*, 11a.

III. UNLESS CORRECTED BY THIS COURT, THE FOURTH CIRCUIT'S DECISION WILL ENCOURAGE GOVERNMENTS AT ALL LEVELS TO IMPERMISSIBLY RESTRICT WELL-ESTABLISHED FIRST AMENDMENT RIGHTS

The Fourth Circuit's decision in *Anheuser-Busch I* warranted this Court's review because of the substantial threat that it posed to the rights of all commercial speakers and their audiences. In light of the majority's readoption of that decision, the threat to First Amendment rights remains. Indeed, on remand, the majority has further lowered the First Amendment threshold by announcing its rule of "special solicitude," which endangers not only commercial speech, but also fully protected speech. Under the majority's reasoning, a government need only claim that censorship is necessary to protect children, and fundamental First Amendment rights to all types of speech will be diminished. This Court should not allow a decision to stand that encourages government to reduce the level of discourse emanating from a soapbox to that appropriate for a sandbox.[14] *Cf. Bolger*, 463 U.S. at 73-74.

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[14] There can be no doubt that the majority's "special solicitude" rule threatens all types of protected speech because the majority identified as its supporting authorities this Court's decisions involving fully protected, albeit indecent, speech. App., *infra*, 8a-9a.

In any event, the majority's deviant undervaluing of commercial speech rights is reason enough to grant this petition. As this Court stated in *Rubin*, "the free flow of commercial information is 'indispensable to the proper allocation of resources in a free enterprise system' . . . ," and "a 'particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate.'" 115 S. Ct. at 1589 (citations omitted; second ellipses in original). Accordingly, the courts are required to hold a would-be regulator of speech to a substantial burden of proof, especially when it is motivated, as here, by a paternalistic desire to manipulate behavior through censorship. *See Florida Bar*, 115 S. Ct. at 2379 n.2.

The Fourth Circuit majority has provoked this Court's review once again by readopting language and concepts with far-reaching implications. Its decision is not simply about billboards in Baltimore, but about the principle of separation of powers as it applies in the context of the Bill of Rights. By holding that the courts cannot engage in judicial review of legislative "findings" that purportedly support a restriction on First Amendment rights ("[t]o do so would ignore the structural separation between legislative bodies and courts and would improperly subordinate one branch to the other," App., *infra*, 26a), the majority significantly departed from the intent of the Framers: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles *to be applied by the courts.*" *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943) (emphasis supplied).[15]

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[15] The deference the Fourth Circuit granted Baltimore's legislative "findings" is not only inconsistent with this Court's commercial speech jurisprudence, it runs afoul of one of the fundamental dictums applicable to *all* First Amendment cases, that "[d]eference to a legislative finding cannot limit judicial inquiry when First

Under the majority's approach of radical deference, however, a government that wishes to restrict commercial speech need only create a self-serving legislative record that essentially says, "We believe that our version of the truth justifies the imposition of censorship to further our goals." A speaker who seeks to defend its First Amendment rights will barely be allowed to enter the courthouse before being ejected on a Rule 12(b)(6) motion with no opportunity to contest the relevance and reliability of the "evidence" in the legislative record or to submit its own evidence. No matter what the facts really are, censorship will always prevail. This is not a merely hypothetical scenario; it is precisely what happened here. The First Amendment rights of commercial speakers to communicate truthful information to the public, and the public's right to receive that information, are too important to allow the majority's regressive decision to stand.

Amendment rights are at stake." *Landmark Comms., Inc. v. Virginia*, 435 U.S. 829, 843 (1978). Pointedly, in *Landmark* this Court directly rebuffed the lower court for acknowledging "that the record before it was devoid of 'actual facts,' but [going] on to hold that such proof was not required when the legislature itself had made the requisite finding . . . ." *Id.*

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the judgment below should be summarily reversed and these cases should be remanded with instructions to permit discovery and a subsequent evidentiary hearing on the merits.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 94-1431, 94-1432

ANHEUSER-BUSCH, INCORPORATED,
Plaintiff-Appellant,

v.

KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; MAYOR AND CITY COUNCIL OF BALTIMORE CITY; CITY COUNCIL OF BALTIMORE CITY; DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement,
Defendants-Appellees.

and

JOHN JOSEPH CURRAN,
Attorney General of the State of Maryland,
in his official capacity,
Defendant.

THE ASSOCIATION OF NATIONAL ADVERTISERS, INCORPORATED; THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES; THE MEDIA INSTITUTE; NATIONAL ASSOCIATION OF BROADCASTERS; THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION; WASHINGTON LEGAL FOUNDATION; CENTER FOR SCIENCE IN THE PUBLIC INTEREST; COALITION FOR BEAUTIFUL NEIGHBORHOODS; BALTIMORE CITY WIDE LIQUOR COALITION FOR BETTER LAWS AND REGULATIONS,
Amici Curiae.

PENN ADVERTISING OF BALTIMORE, INCORPORATED,
Plaintiff-Appellant,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY,
A Municipal Corporation,
Defendant-Appellee,

and

JOHN JOSEPH CURRAN,
Attorney General of the State of Maryland,
in his official capacity,
Defendant.

THE ASSOCIATION OF NATIONAL ADVERTISERS, INCORPORATED; THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES; THE MEDIA INSTITUTE; NATIONAL ASSOCIATION OF BROADCASTERS; THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION; WASHINGTON LEGAL FOUNDATION; CENTER FOR SCIENCE IN THE PUBLIC INTEREST; COALITION FOR BEAUTIFUL NEIGHBORHOODS; BALTIMORE CITY WIDE LIQUOR COALITION FOR BETTER LAWS AND REGULATIONS,
Amici Curiae.

Nov. 13, 1996

Before NIEMEYER and HAMILTON, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by published opinion. Judge NIEMEYER wrote the majority opinion, in which Judge HAMILTON joined. Senior Judge BUTZNER wrote a dissenting opinion.

OPINION

NIEMEYER, Circuit Judge:

On May 13, 1996, the Supreme Court handed down its decision in *44 Liquormart, Inc. v. Rhode Island*, —— U.S. ——, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996), and a week later vacated our decision in this case and remanded it to us "for further consideration in light of *44 Liquormart, Inc. v. Rhode Island*." —— U.S. ——, 116 S.Ct. 1821, 134 L.Ed.2d 927. We have read the opinion in 44 Liquormart and have considered its impact on the judgment in this case. For the reasons that follow, we conclude that 44 Liquormart does not require us to change our decision. Accordingly, we affirm the district court's judgment for the reasons previously given and readopt our previous decision.* See *Anheuser-Busch, Inc. v. Schmoke*, 63 F.3d 1305 (4th Cir.1995) (*Anheuser-Busch I*).

I

In *Anheuser-Busch I*, we upheld against a constitutional challenge a city ordinance prohibiting the placement of statutory, outdoor advertising that advertises alcoholic beverages in certain areas of Baltimore City. 63 F.3d at 1317. The ordinance was designed to promote the welfare and temperance of minors exposed to advertisements

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* In readopting our opinion, we do not continue to rely on *Posadas de Puerto Rico Associates v. Tourism Co. of P.R.*, 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986), in view of the doubt placed on that opinion by a majority of the Court in *44 Liquormart*. See —— U.S. at ——, 116 S.Ct. at 1511 (Stevens, J., concurring in the judgment) (joined by Kennedy, Thomas, and Ginsburg, JJ.) and —— U.S. at ——, 116 S.Ct. at 1522 (O'Connor, J., concurring in the judgment) (joined by Rehnquist, C.J., and Souter and Breyer, JJ.). Because we do not defer blindly to the legislative rationale, but rather agree with it based on our own independent conclusion about the fit between legislative objective and the regulation used to achieve that objective, the holding in *Posadas* is not necessary to our opinions upholding Baltimore City's ordinance.

for alcoholic beverages by banning such advertisements in particular areas where children are expected to walk to school or play in their neighborhood. *Id.* at 1314-17. Applying the four- prong test for evaluating commercial speech announced in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), we concluded, in respect to the disputed prongs, that the ban of outdoor advertising of alcoholic beverages in limited areas directly and materially advances Baltimore's interest in promoting the welfare and temperance of minors. See *Anheuser-Busch I*, 63 F.3d at 1314. After our own independent assessment, we recognized the reasonableness of Baltimore City's legislative finding that there is a "definite correlation between alcoholic beverage advertising and underage drinking." *Id.* We also conclude that the regulation of commercial speech is not more extensive than necessary to serve the governmental interest. *Id.* at 1316-17. Recognizing that in the regulation of commercial speech there is some latitude in the "fit" between the regulation and the objective, we concluded that "no less restrictive means may be available to advance the government's interest." *Id.* at 1316. While we acknowledged that the geographical limitation on outdoor advertising may also reduce the opportunities for adults to receive the information, we recognize that there were numerous other means of advertising to adults that did not subject the children to "involuntary and unavoidable solicitation [while] . . . walking to school or playing in their neighborhood." *Id.* at 1314. Based on our close look at Baltimore's asserted goal and the billboard zoning used to achieve that objective, we concluded:

> Although no ordinance of this kind could be so perfectly tailored as to all and only those areas to which children are daily exposed, Baltimore's efforts to tailor the ordinance by exempting commercial and industrial zones from its effort renders it not more

extensive than is necessary to serve the governmental interest under consideration.

Id. at 1317.

II

In *44 Liquormart,* by contrast, the State prohibited all advertising throughout Rhode Island, "in any manner whatsoever, of the price of alcoholic beverages except for price tags or signs displayed with the beverages and not visible from the street. —— U.S. at ——, 116 S.Ct. at 1501. The State contended that the ban served the State's interest in promoting temperance by keeping alcoholic prices high and therefore consumption low. See *id.* The district court found as a fact, however, that the ban "has no significant impact" on consumption. *44 Liquor Mart, Inc. v. Racine,* 829 F.Supp. 543, 549 (D.R.I. 1993). The State also argued that the Twenty-first Amendment's delegation to the states of the power "to prohibit commerce in, or the use of, alcoholic beverages," U.S. Const. amend. XXI, § 2, favors the state's ban of price advertising of alcoholic beverages. See —— U.S. at ——, 116 S.Ct. at 1502.

The Supreme Court held the blanket ban unconstitutional simply as "an abridgement of speech protected by the First Amendment" and rejected the claim that the Twenty-first Amendment "save[d] Rhode Island's ban on liquor price advertising." —— U.S. at ——, - ——, 116 S.Ct. at 1501, 1514-15. The opinion for the Court did not provide a rationale for its conclusion that the ban violated the First Amendment, and no opinion addressing the First Amendment violation commanded a majority of the Court. Under *Marks v. United States,* 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), when a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the

judgments on the narrowest grounds." *Id. at* 193, 97 S.Ct. at 993.

Applying the Marks rule, eight justices in three separate opinions concluded that the mechanism of keeping alcoholic prices high as a way to keep consumption low imposes too broad a prohibition on speech to be justified by the end. See *44 Liquormart,* —— U.S. at ——-——, 116 S.Ct. at 1509-10 (Stevens, J., concurring in the judgment); *id.* at ——, 116 S.Ct. at 1519 (Thomas, J., concurring in the judgment); *id.* at ——-——, 116 S.Ct. at 1521-22 (O'Connor, J., concurring in the judgment). Justice Stevens, joined by Justices Kennedy, Souter, and Ginsburg, noted that "without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance." *Id.* at ——, 116 S.Ct. at 1509. Justice Stevens also noted that alternative forms of regulation were available that would not impinge speech and would "be more likely to achieve the State's goal of promoting temperance. As the State's own expert conceded, higher prices can be maintained either by direct regulation or by increased taxation." *Id.* at ——, 116 S.Ct. at 1510. Similarly, Justice O'Connor, writing an opinion in which Chief Justice Rehnquist, Justice Souter and Justice Breyer joined, concluded,

> If the target is simply higher prices generally to discourage consumption, the regulation imposes too great, and unnecessary, a prohibition on speech in order to achieve it. . . . "[T]he objective of lowering consumption of alcohol by banning price advertising could be accomplished by establishing minimum prices and/or by increasing sales taxes on alcoholic beverages."

Id. at ——-——, 116 S.Ct. at 1521-22 (O'Connor, J., concurring in the judgment) (quoting *44 Liquormart, Inc. v. Rhode Island,* 39 F.3d 5, 7 (1st Cir. 1994)

(quoting Rhode Island's expert witness)). Justice O'Connor concluded that because the regulation fails "even the less stringent standard set out in Central Hudson, nothing here requires adoption of a new analysis for the evaluation of commercial speech regulation." *Id.* at ——, 116 S.Ct. at 1522 (O'Connor, J., concurring in the judgment). Eight justices thus concluded that keeping legal users of alcoholic beverages ignorant of prices through a blanket ban on price advertising does not further any legitimate end. See *id.* at ——-——, 116 S.Ct. at 1509-10 (Stevens, J., concurring in the judgment); *id.* at ——, 116 S.Ct. at 1518 (Thomas, J., concurring in the judgment); *id.* at ——-——, 116 S.Ct. at 1521-22 (O'Connor, J., concurring in the judgment).

III

While Rhode Island's blanket ban on price advertising failed Central Hudson scrutiny, Baltimore's attempt to zone outdoor alcoholic beverage advertising into appropriate areas survived our "close look" at the legislature's means of accomplishing its objective in Anheuser-Busch I. Baltimore's ordinance expressly targets persons who cannot be legal users of alcoholic beverages, not legal users as in Rhode Island. More significantly, Baltimore does not ban outdoor advertising of alcoholic beverages outright but merely restricts the time, place, and manner of such advertisements. And Baltimore's ordinance does not foreclose the plethora of newspaper, magazine, radio, television, direct mail, Internet, and other media available to Anheuser-Busch and its competitors.

Moreover, in Baltimore City's case, neither the state nor the city is attempting to undermine democratic processes and circumvent public scrutiny by substituting a ban on advertising for a ban on the product, as the *44 Liquormart* Court feared was the case with Rhode Island. —— U.S. at ——, 116 S.Ct. at 1508 (Stevens, J., concurring in the judgment); see also *id.* at ——, 116 S.Ct. at 1517 (Thomas, J., concurring in the judgment) (citing

"the dangers of permitting the government to do covertly what it might not have been able to muster the political support to do openly"); *Central Hudson,* 447 U.S. at 566 n. 9, 100 S.Ct. at 2351 n. 9; *Virginia Pharmacy Board v. Virginia Citizens Consumer Council,* 425 U.S. 748, 780 n. 8, 96 S.Ct. 1817, 1835 n. 8, 48 L.Ed.2d 346 (1976) (Stewart, J., concurring). Rather, in Baltimore City, like in other communities, the possession and consumption of alcoholic beverages by minors has been already banned directly and forthrightly through legislation. See Md. Code Art. 27, §§ 400-403A. Baltimore's restrictions thus reinforce the democratic decisionmaking mechanism's conclusion as to the dangerousness of underage drinking by protecting children from exposure to advertising which the legislature reasonably considers harmful in itself to children's maturation. And far from undermining the free dissemination of information to independently choosing consumers, Baltimore's ordinance supports the full development of its young so that they will be able to assess their market options intelligently and independently.

In addition to the reasons given in *Anheuser-Busch I* and given here based on our consideration of 44 Liquormart, the differences between the Baltimore and Rhode Island regulations further support the constitutionality of Baltimore's ordinance. In contrast to Rhode Island's desire to enforce adult temperance through an artificial budgetary constraint, Baltimore's interest is to protect children who are not yet independently able to assess the value of the message presented. This decision thus conforms to the Supreme Court's repeated recognition that children deserve special solicitude in the First Amendment balance because they lack the ability to assess and analyze fully the information presented through commercial media. In the context of cable television, the Supreme Court recently upheld restrictions on programming imposed by the Cable Television Consumer Protection and Competition Act as a means of protecting children from indecent programming. See *Denver Area Educ. Telecommunications Con-*

sortium, Inc. v. FCC, —— U.S. ——, ——, 116 S.Ct. 2374, 2386, 135 L.Ed.2d 888 (1996) (plurality opinion). In the context of the radio medium, the Court has approved extra restrictions on indecent speech because of the pervasiveness of the medium and the presence of children in the audience. See *FCC v. Pacifica Foundation*, 438 U.S. 726, 750-51, 98 S.Ct. 3026, 3040-41, 57 L.Ed. 2d 1073 (1978) (comparing indecent speech during hours when children are listening to the proverbial pig in the parlor); see also *Action for Children's Television v. FCC*, 58 F.3d 654, 657 (D.C. Cir. 1995) (upholding the Public Telecommunications Act against a First Amendment challenge based on the state's compelling interest in protecting minors), *cert. denied*, —— U.S. ——, 116 S.Ct. 701, 133 L.Ed.2d 658 (1996). Similarly, the Supreme Court has sustained a law which protected children from non-obscene literature. See *Ginsberg v. New York*, 390 U.S. 629, 639-40, 88 S.Ct. 1274, 1280-81, 20 L.Ed. 2d 195 (1968). And, while it has acknowledged a right to private possession of adult pornography in the home, see *Stanley v. Georgia*, 394 U.S. 557, 566, 89 S.Ct. 1243, 1248-49, 22 L.Ed.2d 542 (1969), the Court has clearly distinguished child pornography and allowed a stronger legislative response "to destroy a market for the exploitative use of children." *Osborn v. Ohio*, 495 U.S. 103, 109, 110 S.Ct. 1691, 1696, 109 L.Ed.2d 98 (1990); see also *New York v. Ferber*, 458 U.S. 747, 759, 102 S.Ct. 3348, 3355-56, 73 L.Ed.2d 1113 (1982). The underlying reason for the special solicitude of children was articulated long ago: "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." *Prince v. Massachusetts*, 321 U.S. 158, 168, 64 S.Ct. 438, 443, 88 L.Ed. 645 (1944).

Baltimore's ordinance attempts to protect its children in a manner and with a motive distinct from those evidenced by Rhode Island in 44 Liquormart and in accord with an unbroken chain of Supreme Court cases which

indicate its desire to ensure that children do not become lost in the marketplace of ideas. Accordingly, on reconsideration of our Central Hudson analysis of the time, place, and manner restriction in Anheuser-Busch I in light of 44 Liquormart, we again affirm the judgment of the district court.

IT IS SO ORDERED.

BUTZNER, Senior Circuit Judge, dissenting:

I dissent because I believe we should vacate the district courts' judgments and remand these cases for evidentiary hearings. I address in this dissent both the cases pertaining to advertising of alcoholic beverages and the case pertaining to advertising of cigarettes.

The district court, whose judgment we review, noted that the parties agree that "the [Anheuser-Busch] advertising at issue is not unlawful or misleading, and that the City's interest in promoting the welfare and temperance of minors is substantial. . . ." *Anheuser-Busch, Inc. v. Mayor and City Council,* 855 F.Supp. 811, 813 (D. Md. 1994). This agreement established that the advertising satisfies the first two parts of the test the Supreme Court prescribed for determining whether regulation of commercial speech violates the First Amendment. See *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557, 566, 100 S.Ct. 2343, 2351, 65 L.Ed.2d 341 (1980). The difficulty in these cases, and in the related case pertaining to cigarette advertising,* arises from the third and fourth parts of the Central Hudson inquiry. These are "whether the regulation directly

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* *Penn Advertising of Baltimore, Inc. v. Mayor and City Council,* 862 F.Supp. 1402 (D. Md. 1994), aff'd, 63 F.3d 1318 (4th Cir. 1995), *vacated and remanded sub nom. Penn Advertising of Baltimore, Inc. v. Schmoke,* —— U.S. ——, 116 S.Ct. 2575, 135 L.Ed.2d 1090 (1996).

advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Central Hudson,* 447 U.S. at 566, 100 S.Ct. at 2351. In the cigarette advertising case, the district court noted that the parties agree with the first—but not the second—part of the *Central Hudson* test. *Penn Advertising,* 862 F.Supp. at 1406. This slight difference in the posture of the cases does not change my analysis of the proper response to the Supreme Court's remand.

My dissent concerns how we should respond to the Supreme Court's remand and what procedures we should follow at this stage of the litigation. My dissent does not undertake to express an opinion on the merits of these cases. I wholeheartedly agree with Baltimore's officials, the amici who support them, and the parties that minors should not be encouraged directly or subliminally to drink or smoke. Nevertheless, balancing the First Amendment's protection of commercial speech against the city's restriction of the advertising at issue requires answering the third and fourth inquiries of Central Hudson. To obtain a sound basis for deciding these inquiries, district and reviewing courts need factual records. The district courts reached their decisions in *Anheuser-Busch* and *Penn Advertising* without an evidentiary hearing. Instead, the courts relied in large part on *Posadas de Puerto Rico Assoc. v. Tourism Co. of P.R.,* 478 U.S. 328, 106 S.Ct. 2968, 92 L.Ed.2d 266 (1986), and deferred to the Baltimore City Council's legislative record and findings. Unfortunately, the district courts did not have the benefit of *44 Liquormart, Inc. v. Rhode Island,* —— U.S. ——, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996).

In *44 Liquor Mart,* the district court did not accept Rhode Island's legislative determination that banning the advertising of liquor prices would reduce consumption. Instead, the district court conducted an evidentiary hearing and reached the conclusion, which was based on testimony at the hearing, that the ban was unconstitutional.

44 Liquor Mart, Inc. v. Racine, 829 F.Supp. 543 (D.R.I. 1993). The court of appeals reversed, accepting as reasonable Rhode Island's submission that competitive price advertising would increase consumption. It held that the statute was constitutional. *44 Liquormart, Inc. v. Rhode Island,* 39 F.3d 5 (1st Cir. 1994). In turn, the Supreme Court reversed, criticizing the court of appeals' reliance on legislative findings to determine whether the ban of commercial speech infringed the First Amendment. *44 Liquormart,* —— U.S. at ——-——, 116 S.Ct. at 1503-04 (Stevens, J.) and —— U.S. at ——, 116 S.Ct. at 1515 (O'Connor, J., concurring in the judgment). By deciding not to remand for an evidentiary hearing despite the teaching of 44 Liquormart, I am concerned that our court is following the First Circuit's path.

In *44 Liquormart,* the Court criticized its own opinion in Posadas, 478 U.S. at 342, 344, 106 S.Ct. at 2977, 2978, because it had "accepted as reasonable, without further inquiry, Puerto Rico's assertions that the regulations furthered the government's interest and were no more extensive than necessary to serve that interest." *44 Liquormart,* —— U.S. at ——, 116 S.Ct. at 1522 (O'Connor, J., concurring in the judgment). At least seven members of the Court expressly decided not to follow Posadas, concluding that a legislature's decision to suppress commercial speech, even if reasonable, is not entitled to deference. *44 Liquormart,* —— U.S. at ——-——, 116 S.Ct. at 1510-11 (Stevens, J., concurring in the judgment) and —— U.S. at ——, 116 S.Ct. at 1522 (O'Connor J., concurring in the judgment). Rather than accept at face value the legislature's proffered justification for a speech regulation, courts should take a "closer look" and carefully examine "the relationship between the asserted goal and the speech restriction used to reach that goal." —— U.S. at ——, 116 S.Ct. at 1522 (O'Connor, J., concurring in the judgment). In other words, courts should examine the evidence presented by the parties to

make an independent determination about whether the underlying facts satisfy the *Central Hudson* test. See —— U.S. at ——-——, 116 S.Ct. at 1509-10 (Stevens, J., concurring in the judgment).

The independent evaluation that is now required is not possible in the absence of a factual record. It is true that the positions taken by Baltimore may turn out to be supported by a preponderance of the evidence. But speculation about what might be is not enough to resolve issues of First Amendment coverage that must ultimately turn on factual findings. In order to meet its burden under Central Hudson, the city must show "not merely that its regulation will advance its interest, but also that it will do so 'to a material degree.'" *44 Liquormart,* —— U.S. at ——, 116 S.Ct. at 1509 (Stevens, J., concurring in the judgment) (quoting *Edenfield v. Fane,* 507 U.S. 761, 771, 113 S.Ct. 1792, 1800-01, 123 L.Ed.2d 543 (1993)). Even assuming, as common sense might suggest that Baltimore's restrictions will reduce underage drinking to some degree, without any findings of fact we cannot determine whether the effect will be significant. See *44 Liquormart,* —— U.S. at ——, 116 S.Ct. at 1509 (Stevens, J., concurring in the judgment). Accordingly, each party should be given the opportunity to present evidence on this issue and to test the strength of the opposing party's evidence.

Baltimore must also show that its speech regulation is narrowly tailored. Anheuser-Busch argued that the city could implement other measures that would reduce underage drinking as effectively as the advertising restrictions without regulating speech. The company specifically suggested education programs and increased law enforcement efforts. *Cf. 44 Liquormart,* —— U.S. at ——, 116 S.Ct. at 1510 (Stevens, J., concurring in the judgment) and —— U.S. at ——-——, 116 S.Ct. at 1521-22 (O'Connor, J., concurring in the judgment). The company's position must be viewed in light of the numerous exceptions to the ordinance that inevitably will allow a substantial amount of alcohol advertising to reach a great

number of minors. The company's argument should be evaluated on the strength of the facts that support and negate it. The parties should be given the opportunity to present and contest those facts.

The same reasoning applies to Baltimore's restriction on cigarette advertising. Whether that restriction advances the asserted governmental interest and whether it is unnecessarily extensive raise factual questions that only an evidentiary hearing can answer. For example, Baltimore's transit buses, which carry children as well as adults, are exempted from the ordinance that restricts advertising of cigarettes. The ordinance permits such advertising at a ball park where minors watch games. What effect these and similar facts have on the validity of the city ordinance should be weighed by a court.

A charge that advertising restrictions infringe rights guaranteed by the First Amendment requires careful evaluation assessing the credibility of witnesses and weighing the evidence. These functions should be performed by a judge—not by a city council. See *44 Liquormart,* —— U.S. at ——, 116 S.Ct. at 1511 (Stevens, J., concurring in the judgment). The court should base its evaluation of the case on the facts underlying the dispute and the reasonable inferences drawn from those facts rather than the version of the facts that appears in the allegations and legislative findings. By affirming the district court's judgment without adducing and examining the facts, a reviewing court engages in the type of deferential review that 44 Liquormart deems improper.

Present in this litigation are questions about the credibility of expert witnesses and genuine issues of material fact concerning the inferences that reasonably can be drawn from the evidence. Because of these circumstances, neither summary judgment nor dismissal under Rule of Civil Procedure 12(b)(6) is appropriate.

I would vacate the district court's judgment and remand these cases for evidentiary hearings.

APPENDIX B

SUPREME COURT OF THE UNITED STATES

No. 95-685

ANHEUSER-BUSCH, INC., *et al.*,
Petitioners,

v.

KURT L. SCHMOKE,
Mayor of Baltimore City, *et al.*

May 20, 1996

On petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit. Petition for writ of certiorari granted. Judgment vacated and case remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of 44 Liquormart, Inc. v. Rhode Island, 517 U.S. ——, 116 S.Ct. 1495, 134 L.Ed.2d 711 (1996).

APPENDIX C

[Decided Aug. 31, 1995]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-1431

ANHEUSER-BUSCH, INCORPORATED,
Plaintiff-Appellant,

v.

KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; MAYOR AND CITY COUNCIL OF BALTIMORE CITY; CITY COUNCIL OF BALTIMORE CITY; DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement,
Defendants-Appellees,

and

JOHN JOSEPH CURRAN,
Attorney General of the State of Maryland,
in his official capacity,
Defendant.

THE ASSOCIATION OF NATIONAL ADVERTISERS, INCORPORATED; THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES; THE MEDIA INSTITUTE; NATIONAL ASSOCIATION OF BROADCASTERS; THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION; WASHINGTON LEGAL FOUNDATION; CENTER FOR SCIENCE IN THE PUBLIC INTEREST; COALITION FOR BEAUTIFUL NEIGHBORHOODS; BALTIMORE CITY WIDE LIQUOR COALITION FOR BETTER LAWS AND REGULATIONS,
Amici Curiae.

No. 94-1432

PENN ADVERTISING OF BALTIMORE, INCORPORATED,
Plaintiff-Appellant,

v.

JOHN JOSEPH CURRAN,
Attorney General of the State of Maryland,
in his official capacity,
Defendant.

THE ASSOCIATION OF NATIONAL ADVERTISERS, INCORPORATED; THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES; THE MEDIA INSTITUTE; NATIONAL ASSOCIATION OF BROADCASTERS; THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION; WASHINGTON LEGAL FOUNDATION; CENTER FOR SCIENCE IN THE PUBLIC INTEREST; COALITION FOR BEAUTIFUL NEIGHBORHOODS; BALTIMORE CITY WIDE LIQUOR COALITION FOR BETTER LAWS AND REGULATIONS,
Amici Curiae.

Appeals from the United States District Court
for the District of Maryland at Baltimore.
John R. Hargrove, Senior District Judge.
(CA-94-117-HAR, CA-94-145-HAR)

OPINION

NIEMEYER, Circuit Judge:

We decide in this case whether Ordinance 288 enacted by the Mayor and City Council of Baltimore, Maryland, prohibiting the placement of stationary, outdoor "advertising that advertises alcoholic beverages" in certain areas of the City, violates the First and Fourteenth Amendment

protections of commercial speech. The district court concluded, after applying the four-part test for evaluating commercial speech announced in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), that the ordinance did not violate the Constitution,[1] and we now affirm.

I

Under Maryland law, it is illegal to sell any alcoholic beverage to, or to obtain any alcoholic beverage for, a person under 21 years of age. It is also illegal for a person under 21 years of age to obtain, possess, or control an alcoholic beverage. Md. Code, Art. 27, §§ 400-403A. To advance the state's interest in those prohibitions and to promote "the welfare and temperance of minors exposed to advertisements for alcoholic beverages," the Maryland legislature authorized the Mayor and City Council of Baltimore (collectively "Baltimore") to adopt an ordinance restricting the placement of signs that advertise alcoholic beverages in "publicly visible locations," *i.e.* on "outdoor billboards, sides of buildings, and free-standing signboards." Md. Code, Art. 2B, § 222. The authorization, however, contains 10 limitations which prohibit Baltimore from restricting such advertising on, for example, buses, taxicabs, commercial vehicles used in the transportation of alcoholic beverages, and signs at businesses licensed to sell alcoholic beverages, including professional sports stadiums.

In January 1994, Baltimore exercised the authority granted it by the State and enacted Ordinance 288 prohibiting the outdoor advertising of alcoholic beverages in

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[1] The district court also concluded that the protection afforded by Article 40 of the Maryland Declaration of Rights is no broader than that afforded by the First Amendment and that therefore the ordinance also did not violate the Maryland Constitution. That ruling is not appealed.

certain locations in Baltimore City.[2] The prohibition in the ordinance is subject to the same 10 exceptions specified in the State's authorizing statute, and it also includes an exception permitting such advertising in certain commercially and industrially zoned areas of the City. By its terms, the ordinance was to become effective February 5, 1994.

Before enacting the ordinance, the Baltimore City Council conducted public hearings, receiving testimony and previously conducted studies detailing the adverse effects on minors of alcohol consumption and the correlation between underage drinking and the advertising of alcoholic beverages.[3] While one of the studies, the report of the Governor's Prevention Committee, acknowledged that certain studies advanced by the alcohol beverage and advertising industries showed no correlation between alcohol advertising and underage drinking, it concluded that the overwhelming majority of research studies showed a definite correlation. To combat underage drinking, the

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[2] The core provision of the ordinance provides:

> Alcoholic beverage advertisements. No person may place any sign, poster, placard, device, graphic display, or any other form of advertising that advertises alcoholic beverages in publicly visible locations. In this section "publicly visible locations" includes outdoor billboards, sides of buildings, and free standing signboards.

Baltimore City Code, Art. 30 (zoning), § 10.0-1(H).

[3] The preamble to the ordinance refers to at least four studies considered by the City Council: (1) a report by the Prevention Committee of the Governor's Drug and Alcohol Abuse Commission, entitled "The Impact of Alcohol Advertising and the Use of Alcohol in Television Programs and Films on Underage Drinking"; (2) the "1992 Maryland Adolescent Drug Survey" conducted by the Maryland State Department of Education; (3) a report of the U.S. Inspector General, Department of Health and Human Services, entitled "Youth and Alcohol: Dangerous and Deadly Consequences"; and (4) a report of the U.S. Inspector General, Department of Health and Human Services, entitled "Youth and Alcohol: Drinking and Crime."

Prevention Committee's report recommended, among other things, that communities regulate alcoholic beverage advertising on billboards.

In the preamble to the ordinance, the City Council summarized its findings in support of the ordinance. The City Council found, for instance, that the consumption of alcoholic beverages is involved in at least one-half of all the major causes of death among youth and that about one-third of all juvenile males arrested said they had consumed alcohol within the previous 72 hours. In concluding that a connection exists between underage drinking and the widespread advertising of alcoholic beverages, the City Council found that alcoholic beverages are the second most heavily advertised products in America (after cigarettes), and that outdoor billboards are a "unique and distinguishable" medium of advertising which subjects the public to involuntary and unavoidable forms of solicitation. The City Council noted that children are exposed to the advertising of alcoholic beverages "simply by walking to school or playing in their neighborhood" and that children's "attitudes favorable to alcohol are significantly related to their exposure to alcohol advertisements." The City Council pointed to the Prevention Committee's report that the " 'overwhelming majority' of research studies showed a definite correlation between alcohol advertising and underage drinking" and concluded that "[a]n ordinance restricting the placement of advertisements for alcoholic beverages in publicly visible locations within Baltimore City is necessary for the promotion of the welfare and temperance of minors exposed to such advertisements." Attempting to tailor its ban, the City Council allowed advertising of alcoholic beverages in commercial and industrial areas, stating that it was "narrowly focus[ing] its efforts on those advertisements which most directly affect minors where they live, attend school, attend church and engage in recreational activities."

On January 14, 1994, several weeks before the ordinance was to become effective, Anheuser-Busch, Inc., filed suit in federal court, facially challenging the constitutionality of the ordinance under the First and Fourteenth Amendments. It also challenged the ordinance as it might be applied to public service messages which Anheuser-Busch typically sponsors. One week later, Penn Advertising of Baltimore, Inc., filed a similar suit.

Anheuser-Busch is the nation's largest brewer of beers and malt beverages, producing approximately 15 different brands, including Budweiser, Michelob, and Busch. It advertises in all media, including outdoor billboards and displays. In addition to contending that there is no correlation between alcoholic beverage advertising and underage drinking, Anheuser-Busch asserts that the purpose of its advertising is "to solidify brand loyalty and increase market share by shifting adult beer drinkers from other brands to the advertised brand of beer." In its complaint, Anheuser-Busch alleges that it promotes its brands of beer on dozens of billboards in Baltimore and that on seven it publishes public service messages such as, "Know when to say when" and "Let's stop underage drinking before it starts." These public service messages typically include a corporate or product logo of Anheuser-Busch.

Penn Advertising is engaged in the business of placing advertising on outdoor advertising signs located throughout Baltimore. It leases land from private property owners, erects and maintains outdoor sign structures on those locations, and rents these signs to its customers, including Anheuser-Busch.

Shortly after commencing these actions, Anheuser-Busch and Penn Advertising filed a motion for a preliminary injunction to enjoin enforcement of Ordinance 288 pending the litigation, and the district court issued a stay of the ordinance's enforcement. The Mayor and City Council of Baltimore filed motions to dismiss the actions under Federal Rule of Civil Procedure 12(b)(6) on the grounds

that the ordiance is (1) protected by the Twenty-First Amendment and (2) a proper regulation of commercial speech under the framework established in *Central Hudson*. Baltimore attached to its motions the legislative history of Ordinance 288, including the transcript of the hearings before the City Council and copies of four studies that were considered by the Council.

Following a hearing, the district court issued an opinion upholding the constitutionality of the ordinance, *Anheuser-Busch, Inc. v. Schmoke*, 855 F. Supp. 811 (D. Md. 1994). The court also continued its stay of the ordiance's enforcement pending appeal. Contrary to the parties' entreaties that the district court treat Baltimore's motion only as a 12(b)(6) motion, the court concluded in its opinion that because it considered matters outside of the pleadings, it would treat Baltimore's motion to dismiss as a motion for summary judgment under Rule 56. On the merits, the court found that "a reasonable fit exist between the Ordinance and the City's asserted interests," *Id.* at 820, and that billboards "loom[] over children every day while they walk to school, and every time they play in their neighborhood, thus forming an inescapable part of their daily life. . . . Billboard advertisements thus form a constant impetus to consume the product being advertised, the precise goal of the advertisement." *Id.* at 822. The court held the ordinance constitutional after concluding that it "directly advances the City's asserted interest in promoting the welfare and temperance of minors" and is "narrowly tailored" to that end. *Id.* at 818. Having found the ordinace constitutional under the framework set out in *Central Hudson*, the court did not address Baltimore's argument that the ordinance was protected by the Twenty-First Amendment.

On appeal, Anheuser-Busch and Penn Advertising contend that the district court erred by converting Baltimore's motions to dismiss into motions for summary judgment without allowing them a reasonable opportunity to sub-

mit all materials pertinent to consideration of a motion for summary judgment. On the merits, they argue that the ordinance is unconstitutional on its face because (1) it does not directly and materially advance the government's interest in promoting temperance of minors and (2) it is not narrowly tailored to serve that purpose.[4] They also argue that, as applied, the ordinance would impermissibly restrict their noncommercial speech.

II

We address first the contention that the district court erred in converting Baltimore's motions to dismiss into motions for summary judgment without first providing the parties an opportunity to conduct discovery and to submit all pertinent materials to the court. Anheuser-Busch and Penn Advertising contend that they had no indication that the district court had converted the motions to dismiss into motions for summary judgment until the court issued its memorandum opinion.

Federal Rule of Civil Procedure 12(b) provides in relevant part:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, *and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.*

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[4] Amici curiae briefs, addressing principally the facial challenge under the First Amendment, were received from the Association of National Advertisers, Inc., the American Association of Advertising Agencies, The Media Institute, the National Association of Broadcasters, the Thomas Jefferson Center for the Protection of Free Expression, the Coalition for Beautiful Neighborhoods, the Baltimore City Wide Liquor Coalition for Better Laws and Regulations, and the Center for Science in the Public Interest.

(Emphasis added). We have held that a court choosing to treat a motion to dismiss as one for summary judgment errs if it fails to provide the parties with notice and a reasonable opportunity to present their positions under Rule 56. *See Gay v. Wall,* 761 F.2d 175, 178 (4th Cir. 1985); *Plante v. Shivar,* 540 F.2d 1233, 1235 (4th Cir. 1976); *Johnson v. RAC Corp.,* 491 F.2d 510, 513 (4th Cir. 1974).

In ruling on Balitmore's 12(b)(6) motions, the district court stated, without prior notice to the parties, "Because the Court has considered matters outside of the pleadings, the Court will treat the Motion to Dismiss as a Motion for Summary Judgment under Rule 56." 855 F. Supp. at 812. Apparently the court's facial analysis of the ordinance relied to some extent on the exhibits which Baltimore filed with its motion to dismiss, and the court's as-applied analysis involved consideration of the submissions Anheuser-Busch offered in support of its motion for a preliminary injunction. The exhibits which Baltimore filed in support of its motion to dismiss consisted of a copy of Ordinance 288, a transcript of the hearings before the City Council, and four studies that the City Council considered as support for the ordinance. In support of their motions for a preliminary injunction, Anheuser-Busch and Penn Advertising submitted, among other things, the Brewing Industry Advertising Code, sample billboard advertisements, and studies which refute a correlation between alcoholic beverage advertising and underage drinking.

The principal challenge to Ordinance 288, advanced under the last two prongs of *Central Hudson,* consists of the contention that the ordinance (1) does not directly advance the stated governmental purpose and (2) is not narrowly tailored to accomplish that purpose. These prongs focus on the fit between Baltimore's statutory objective and the means it selected to achieve that objective. On this facial challenge, the City bears the burden not of

establishing that at every coordinate the regulation advances a governmental purpose and does no more, but rather that it had an objectively reasonable belief that the means which it selected constituted a reasonable "fit" with the regulation's purpose.

If *Central Hudson*'s test required a perfect fit, then Anheuser-Busch would only have to demonstrate some application of the statute inconsistent with the statute's purpose to render it unconstitutional for all purposes. Moreover, if the test required a perfect fit, Anheuser-Busch would certainly be entitled to complete discovery in order to identify all of the statute's possible applications. However, in response to a facial challenge to a regulation of commercial speech, the burden falls on the government to justify its legislative action, but it does not demand that the government canvass every conceivable situation in which some member of the public may be affected atypically by the statute. And the court's inquiry is limited to consideration of the ordinance on its face against the background of the government's objective and the prospect of the ordinance's general effect. If it appears to the court that the legislative body could reasonably have believed, based on data, studies, history, or common sense, that the legislation would directly advance burden of justifying it is met. *See, e.g., Florida Bar v. Went For It, Inc.*, 63 U.S.L.W. 4644 (June 21, 1995). As the Supreme Court recently observed in *Florida Bar*:

> [W]e have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny, to justify restrictions based solely on history, consensus, and "simple common sense."

Id. at 4647 (citations omitted). *Cf. Edenfield v. Fane*, 113 S. Ct. 1792 (1993) (pointing to facts relevant to consideration of *as-applied* challenge to commercial speech regulation). In *Florida Bar*, the Court relied principally

on a study conducted by the Florida bar on the effects of lawyer advertising to conclude that the prohibition against lawyer solicitation within 30 days of an accident directly and materially advanced the state's substantial interest of preserving the integrity of the legal profession. Thus, the government's burden of justifying its legislative enactment against a facial challenge may be carried by pointing to the enactment itself and its legislative history. These are "legislative facts," the substance of which cannot be trumped by the fact finding apparatus of a single court. *See Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 748-49 n.8 (5th Cir. 1983) (en banc), *cert. denied*, 467 U.S. 1259 (1984). While a party challenging an ordinance can point to other factors not considered by the legislature to demonstrate that the legislature acted irrationally, it cannot subject legislative findings themselves to judicial review under a clearly erroneous standard or otherwise. To do so would ignore the structural separation between legislative bodies and courts and would improperly subordinate one branch to the other. The court's role in reviewing the constitutionality of a legislative enactment is more fundamental; it is limited to addressing whether the legislative enactment conflicts with the Constitution. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

By force of the same reasoning, if a plaintiff challenges a legislative enactment *as applied* to an actual circumstance, then the court is given the task of finding the facts defining that circumstance and determining how the circumstance is impacted by the legislative enactment. *See Edenfield*, 113 S. Ct. at 1800-01.

In this case, the district court properly looked to the legislative history of Ordinance 288 to determine that Baltimore had met its burden under *Central Hudson*. Having found the burden met, the court was not required on a facial challenge to look further with a more specific inquiry into the ordinance's impact on Anheuser-Busch

and Penn Advertising, nor did it. It was unnecessary for the court to have concluded that, because it looked beyond the pleadings to the transcript and four studies constituting the legislative history, it had to consider the case under Rule 56. For purposes of Rule 12(b)(6), the legislative history of an ordinance is not a matter beyond the pleadings but is an adjunct to the ordinance which may be considered by the court as a matter of law. *See generally* 5A Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1357 (1990) (in deciding Rule 12(b)(6) motions, courts may consider matters of public record, items appearing in the record of the case, as well as exhibits attached to the complaint).

Thus, on the facial challenge to Ordinance 288, we will review the district court's decision, insofar as it considered only the ordinance and its legislative history, as a ruling under Federal Rule of Civil Procedure 12(b)(6), and we review that ruling *de novo*.

III

Traditionally, commercial speech was thought to be an aspect of a free market economy, providing information necessary to enable informed market decisions to be made. While commercial speech was subject to governmental regulation, such regulation was resisted by the same forces that favor open and competitive markets. Such speech was not, however, thought to be protected by the First Amendment. *See, e.g., Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942). Beginning in 1975 with the Supreme Court's decision in *Bigelow v. Virginia*, 421 U.S. 809 (1975), and in 1976 with its decision in *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), a "measure" of First Amendment protection was afforded commercial speech in respect to its informational function. But that protection is significantly weaker than that accorded to the regulation of which is examined under the rubric of

strict scrutiny. [sic] *See Metromedia, Inc. v. San Diego,* 453 U.S. 490, 505-07 (1981) (plurality opinion). The Supreme Court has characterized the review of commercial speech regulation as one of intermediate scrutiny, *see generally, Florida Bar,* 63 U.S.L.W. at 4645-46, which is consistent with the "subordinate position [of commercial speech] in the scale of First Amendment values." *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 456 (1978).

Intermediate scrutiny of commercial speech regulation is conducted under the four-pronged scheme set forth in *Central Hudson.* Because the basis for affording protection to commercial speech pertains to its informational function, in order to be entitled to *any* First Amendment protection, the speech must (1) concern lawful activity and not be misleading. *Central Hudson,* 447 U.S. at 563. If the commercial speech meets that threshold prong, it may nevertheless be regulated if the government (2) asserts a substantial interest in support of its regulation; (3) demonstrates that the regulation "directly advances the governmental interest asserted"; and (4) demonstrates that the regulation is "narrowly drawn," *i.e.* "not more extensive than is necessary" to serve the governmental interest. *Id.* at 565-66. *See also Florida Bar,* 63 U.S.L.W. at 4646.

The first two prongs of *Central Hudson* are not disputed in this case. First, the purchase and consumption of alcoholic beverages are generally lawful, and no party claims that Baltimore's ordinance targets misleading advertising. And second, it is conceded that Baltimore City has a substantial interest in promoting "the welfare and temperance of [its] minors," the interest which it seeks to advance through Ordinance 288. The dispute in this case centers on the third and fourth prongs of *Central Hudson*—whether Ordinance 288 "directly advances" Baltimore City's interest in reducing underage drinking and whether the ordinance is not more extensive than

necessary to serve that interest, i.e. whether it is "narrowly drawn." The inquiry required under these two prongs amounts to consideration of the "fit" between the City's ends and the means chosen to accomplish them. *See Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 341 (1986); *United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2705 (1993).

The inquiry under *Central Hudson*'s third prong—whether the regulation directly advances the stated interest—does not involve as strict a nexus as that inherent in the traditional tort concept of causation. Rather, the inquiry seeks to elicit whether it was reasonable for the legislative body to conclude that its goal would be advanced in some material respect by the regulation. In *Edge*, where the federal regulation under consideration prohibited the broadcasting of lottery advertisements from facilities in North Carolina (in support of that state's anti-gambling policy), the Edge Broadcasting Company contended that the regulation did not advance the governmental interest at stake by sufficiently direct means. The company demonstrated that even though its broadcasting facility was located on the North Carolina side of the Virginia/North Carolina border, over 90% of its listeners were located in Virginia, where gambling was not illegal. It also noted that the federal regulation did not prohibit a Virginia-based broadcasting company from directing its signal to North Carolina listeners and advertising the Virginia lottery. The company argued, therefore, that the regulation did not directly advance the stated governmental interest of supporting North Carolina's anti-gambling policy. Rejecting the company's argument, the Supreme Court applied a standard that validated the legislature's commonsense judgment that its interests would be advanced by the regulation:

> Congress plainly made the commonsense judgment that each North Carolina station would have an

> audience in that State, even if its signal reached elsewhere and that enforcing the statutory restriction would insulate each station's listeners from lottery ads and hence advance the governmental purpose of supporting North Carolina's laws against gambling.

113 S. Ct. at 2704. As the result of applying this standard the Court concluded, "We have no doubt that the statutes directly advanced the governmental interest at stake in this case. . . . [T]his would plainly be the case even if, as applied to Edge, there were only marginal advancement of that interest." *Id.* at 2704.

Similarly, in *Posadas* the Court observed that it was reasonable for the Puerto Rico legislature to conclude that its interest in reducing its residents' demand for casino gambling would be advanced by placing limitations on casino advertising. *See* 478 U.S. at 341-42.

Again in *Metromedia*, the Court summarized this approach to the third prong of *Central Hudson* by noting that the reviewing court may be satisfied where the legislative judgment is "not unreasonable." 453 U.S. at 509. The Court applied that principle in upholding a ban on any billboard that constituted a distraction and therefore a hazard to traffic safety, even in the face of a claim that the record was "inadequate to show any connection between billboards and traffic safety." *Id.* at 508.

In each case where the Supreme Court affirmed the legislative judgment as reasonable, a logical correlation existed between the legislative objective and the means selected to achieve that objctive. Thus in *Edge*, even though only 7.8% of Edge Broadcasting's listening public lived in North Carolina and even though that small population would still be subject to Virginia-based lottery advertisements, the Court concluded that North Carolina's anti-gambling policy would be advanced by prohibiting all lottery advertising by North Carolina-based

facilities. *See* 113 S. Ct. at 2704. In *Posadas*, Puerto Rico's regulation prohibiting casinos from "advertis[ing] or otherwise offer[ing] their facilities to the public of Puerto Rico" was likewise found to advance Puerto Rico's interest in reducing its residents' demand for casino gambling. *Id.* at 341. Adding to the obviousness of that logic, the Supreme Court noted that "the fact that appellant has chosen to litigate this case all the way to this Court indicates that appellant shares the legislature's view." *Id.* at 342 (citing the statement from *Central Hudson*, "There is an immediate connection between advertising and demand for electricity [the advertised product]. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales." 447 U.S. at 569).

In line with these precedents, we find that it was reasonable for the Baltimore City Council to have concluded that Ordinance 288's regulation of the outdoor advertising of alcoholic beverages directly and materially advances Baltimore's interest in promoting the welfare and temperance of minors. The City Council found that outdoor advertising is a unique and distinct medium which subjects the public to involuntary and unavoidable solicitation, and that children, simply by walking to school or playing in their neighborhood, are exposed daily to this advertising. The City Council pointed to its legislative finding that the majority of research studies show a definite correlation between alcoholic beverage advertising and underage drinking, while recognizing that not all studies have reached the same conclusion. There is a logical nexus between the City's objective and the means it selected for achieving that objective, and it is not necessary, in satisfying *Central Hudson*'s third prong, to prove conclusively that the correlation in fact exists, or that the steps undertaken will solve the problem. If that were required, communities could never initiate even minor steps to address their problems, for they could never be

assured of the success of their efforts. The proper standard for approval must involve an assessment of the reasonableness of the legislature's belief that the means it selected will advance its ends. Under that approach, we conclude that Baltimore has met its burden of satisfying the third prong of *Central Hudson.*

Each circuit that has considered the regulation of alcoholic beverage advertising has likewise concluded that the regulation of advertising is reasonably aimed at reducing demand. In *Dunagin,* the Fifth Circuit stated:

> We simply do not believe that the liquor industry spends a billion dollars a year on advertising solely to acquire an added market share at the expense of competitors. Whether we characterize our disposition as following the judicial notice approach taken in *Central Hudson Gas,* or following the "accumulated common-sense judgment" approach taken in *Metromedia,* we hold that sufficient reason exists to believe that advertising and consumption are linked to justify the ban, whether or not "concrete scientific evidence" exists to that effect.

718 F.2d at 750. Similarly, in *Oklahoma Telecasters Ass'n v. Crisp,* 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691 (1984), the Tenth Circuit upheld a prohibition against advertising alcoholic beverages, stating:

> [W]e hold, as a matter of law, that prohibitions against the advertising of alcoholic beverages are reasonably related to reducing the sale and consumption of those beverages and their attendant problems. The entire economy of the industries that bring these challenges is based on the belief that advertising increases sales.

Id. at 501. We now join these courts in holding that restricting the outdoor advertising of alcoholic beverages

directly and materially advances the campaign against underage drinking.[6]

Turning to the fourth prong of the *Central Hudson* scheme, we must determine whether the government has demonstrated that its regulation of commercial speech "is not more extensive than is necessary" to serve the stated governmental interest. 447 U.S. at 556. In other words, the means selected to regulate speech must be narrowly tailored to serve a substantial state interest. *See Florida Bar*, 63 U.S.L.W. at 4646; *Board of Trustees of the State Univ. of New York v. Fox*, 492 U.S. 469, 478 (1989). In assessing whether a regulation is narrowly tailored to serve the state's interest under an intermediate scrutiny framework, the Supreme Court has held that the fit between the regulation and the state's interest need not be perfect, but need only be reasonable. *See Fox*, 492 U.S. at 480. Summarizing the fourth prong of *Central Hudson*, the Court in *Fox* stated:

> What our decisions require is a "fit" between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable: that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served; that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decision-

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[6] The rationale for the more general restriction prohibiting the advertising of alcoholic beverages, upheld in *Dunagin* and *Crisp*, may, however, be insufficient to support a general prohibition against *price advertising* of alcoholic beverages, even though such a restriction was upheld in *44 Liquormart, Inc. v. Rhode Island*, 39 F.3d 5 (1st Cir. 1994), *cert. granted*, 115 S. Ct. 1821 (1995). *Cf. Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995) (finding unconstitutional a labeling ban on the disclosure of alcohol content to combat "strength wars").

> makers to judge what manner of regulation may best be employed.

490 U.S. at 469 (citations and internal quotations omitted). Thus, if a regulation goes only "marginally beyond what would adequately have served the governmental interest," the regulation will not be invalidated; only when a regulation is "substantially excessive, disregarding far less restrictive and more precise means" will the regulation be invalidated under this prong of *Central Hudson, Fox,* 492 U.S. at 479 (citations and internal quotations omitted). And when there is no "far less restrictive and more precise means" available, the Court has accepted a broad ban of commercial advertising on the grounds that it was "perhaps the only effective approach." *Metromedia,* 453 U.S. at 508.

Satisfaction of the fourth prong of the *Central Hudson* test presents the closest question in this case. It is readily acknowledged that limitations on outdoor advertising of alcoholic beverages designed to protect minors also reduce the opportunities for adults to receive advertised information. And adults, who constitute a majority of the population, are not the object of the government's legislation. But it also appears that no less restrictive means may be available to advance the government's interest.

Anheuser-Busch argues that Baltimore could just as effectively advance its goal of promoting the welfare and temperance of minors by increasing enforcement of existing laws prohibiting sales to, and possession of alcoholic beverages by, minors, or by implementing and encouraging educational programs on the dangers of alcohol. These approaches might indeed prove beneficial in reducing underage drinking, but they do not provide an alternative to the approach selected by the City of curbing the enticement to consume alcoholic beverages. As the Supreme Court observed, quoting the Fifth Circuit in *Dunagin*:

> "We do not believe that a less restrictive time, place and manner restriction, such as a disclaimer warning of the dangers of alcohol, would be effective. The state's concern is not that the public is unaware of the dangers of alcohol. . . . The concern instead is that advertising will unduly promote alcohol consumption despite known dangers."

Posadas, 478 U.S. at 344 (quoting *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 751 (5th Cir. 1983) (en banc), *cert. denied*, 467 U.S. 1259 (1984).

If there were some less restrictive means of screening outdoor advertising from minors, or of reducing the area of billboard regulation in a manner that would have it focus more efficiently on reaching minors, the City would have to consider those alternatives. But it is not an acceptable response to the approach taken by the City of limiting advertising exposure to say that the City must abandon altogether an approach that directly advances its goal. In the face of a problem, as significant as that which the *City* seeks to address, the City must be given some reasonable latitude. *See Posadas*, 478 U.S. at 346-47; *Metromedia*, 453 U.S. at 509; *Ohralik*, 436 U.S. at 455-56. Similar problems did not defeat the legislature's efforts in *Posadas* (where a ban that went substantially beyond the targeted population was upheld); in *Edge* (where a ban that was intended to apply to only 7.8% of the regulated company's listening public was upheld); or in *Metromedia* (where a ban on all billboards containing commercial advertising was upheld, even though some signs might not create a traffic hazard).

The problem of underage drinking is a most serious one that contributes significantly to a variety of social problems. Baltimore was faced with statistics showing that fully one-half of all deaths of minors were alcohol-related and 40 to 50% of juveniles who drowned or had driving accidents had consumed alcohol immediately prior to the incident. The City Council found that alcohol is

overwhelmingly and consistently the most widely used "drug" at all adolescent age levels. It pointed to data which showed that over half of all twelfth graders, 40% of tenth graders, and over a quarter of eighth graders reported that they consumed alcohol within the past 30 days. Widespread underage drinking was also found to be a major factor in crime. One-third of all juvenile males arrested said they had consumed alcohol within the previous 72 hours, and nearly 40% of all youths in adult correctional facilities reported drinking alcohol before committing their crime.

While it was readily recognized that regulating outdoor advertising would not wholly cure these problems, the regulation was one of the means recommended by the Governors Prevention Commission, and it was responsive to numerous studies which link alcohol advertising and underage drinking. Through outdoor advertising, children are involuntarily and unavoidably confronted daily with the advertised message. *See Packer Corp. v. Utah,* 285 U.S. 105, 110 (1931) (billboards are "seen without the exercise of choice or volition," and viewers have the message "thrust upon them by all the arts and devices that skill can produce"). The City argues that the only means to address this problem is to ban such advertising in locations where children generally walk and play. Such a ban still permits adults to receive advertising messages and information from signs in commercial areas of the City and through the numerous other media to which adults are constantly exposed.[6]

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[6] It is noteworthy that for similar reasons the FCC has prohibited cigarette advertising on television and other electronic media. *See* Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1331 et seq. (upheld in *Capital Broadcasting Co. v. Mitchell,* 333 F. Supp. 582 (D.D.C. 1971), *summarily aff'd sub nom. National Assoc. of Broadcasters v. Kleindienst,* 405 U.S. 1000 (1972)). Yet parents have more control over children's exposure to television than they have over children's exposure to outdoor advertising.

Although no ordinance of this kind could be so perfectly tailored as to all and only those areas to which children are daily exposed, Baltimore's efforts to tailor the ordinance by exempting commercial and industrial zones from its effort renders it not more extensive than is necessary to serve the governmental interest under consideration. Accordingly, we find that Baltimore's Ordinance 288 limiting the location of outdoor billboards advertising alcoholic beverages in the City of Baltimore meets *Central Hudson*'s fourth prong.

In summary, Baltimore City's regulation of statutory outdoor "advertising that advertises alcoholic beverages" in certain locations directly and materially advances a substantial governmental interest in promoting the welfare and temperance of minors who are involuntarily and unavoidably exposed to such advertisements. While the means selected of limiting the location of such outdoor advertising is not a perfect "fit" with the governmental objective, it nevertheless falls well within the range tolerated by the First Amendment for the regulation of commercial speech.

IV

In addition to their facial challenge of Ordinance 288, Anheuser-Busch and Penn Advertising contend that "as applied" the ordinance will impermissibly restrict *noncommercial* speech. They argue that the prohibition of outdoor "advertising that advertises alcoholic beverages" would prohibit their noncommercial public service messages which, they maintain, address issues of public interest. On "at least seven" of its billboards in Baltimore City, Anheuser-Busch has devoted a portion of its advertising display space to public service messages, such as "Let's stop underage drinking before it starts," and "Take a friend home for the holidays—friends know when to say when." These messages also include the corporate logo for Anheuser-Busch or a reference to "Budweiser."

There are no allegations that Baltimore considers these signs to fall under the ordinance as "advertising that advertises alcoholic beverages." Indeed, Anheuser-Busch's complaint was filed before the ordinance was to take effect, and as a result, the enforcement of the ordinance has been stayed. Furthermore, the City has indicated that it does not intend to enforce the ordinance against noncommercial speech.

In addressing this argument, the district court observed that whether the public service messages actually constitute noncommercial speech is arguable. The court assumed, without deciding, that the ordinance would not apply to legitimate public service messages, but was unwilling to "render an advisory opinion solely to distinguish between legitimate [public service messages] and true advertisements." 855 F. Supp. at 821. The question of whether speech both advertising a product and providing a public service message constitutes commercial speech is not well settled and may rest strictly on factual findings.

It is settled that commercial speech is speech which does "no more than propose a commercial transaction." *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66 (1983) (citations and internal quotations omitted). But in *Bolger* the Court held that multi-page flyers published by a contraceptive manufacturing company to publicize the availability and desirability of contraceptives constituted commercial speech "notwithstanding the fact that they containe[d] discussions of important public issues such as venereal disease and family planning." *Id.* at 67-68 (footnote omitted). The Court explained, "We have made clear that advertising which 'links a product to a current public debate' is not thereby entitled to the constitutional protection afforded noncommercial speech." *Id.* at 68 (quoting *Central Hudson*, 447 U.S. at 563 n.5).

In this case, Ordinance 288 is directed only at commercial billboards advertising the sale of alcoholic beverages and does not facially regulate public service messages. The question of whether a particular billboard falls within the ordinance's proscription is, on the record before us, a hypothetical one. The City has not threatened to enforce its ordinance against such public service messages and has indicated that it does not intend to do so. Accordingly, we conclude that such an as-applied review of the ordinance must await an actual or threatened enforcement of the ordinance against a particular advertisement.

For the reasons stated, we affirm the judgment of the district court, upholding Baltimore City Ordinance 288 against a facial constitutional challenge under the First and Fourteenth Amendments.

AFFIRMED

APPENDIX D

[Filed Mar. 28, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Actions Nos. HAR-94-117
HAR 94-145

ANHEUSER-BUSCH, INC. and
PENN ADVERTISING OF BALTIMORE, INC.,
Plaintiffs,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY, *et al.*,
Defendants.

MEMORANDUM OPINION

Plaintiffs Anheuser-Busch, Inc. ("Anheuser-Busch") and Penn Advertising of Baltimore, Inc. ("Penn Advertising") have each brought suit for declaratory and injunctive relief against defendants Mayor and City Council of Baltimore City (the municipal corporation), Kurt L. Schmoke (and his successors as the Mayor of Baltimore City), the City Council of Balimore City, and David Tanner (and his successors as General Superintendent of Zoning Administration and Enforcement), (hereinafter collectively referred to as "the City"). Anheuser-Busch and Penn Advertising challenge Article 30, Section 10.0-1H and Article 30, Section 11.0-7 of the Baltimore City Code, as promulgated by Bill No. 626 (hereinafter collectively referred to as "the Advertising Ban" or "the Ordinance"), as violating the First Amendment to the Constitution of the United States and Article 40 of the

Declaration of Rights of the Maryland Constitution. The Court consolidated the two separate actions on the record in open court in light of their common questions of law and fact. Fed. R. Civ. P. 42(a).

Presently before the Court is a Motion for Preliminary Injunction brought by Anheuser-Busch and Penn Advertising, and a Motion to Dismiss submitted by the City. Because the Court has considered matters outside of the pleadings, the Court will treat the Motion to Dismiss as a Motion for Summary Judgment under Rule 56, Fed. R. Civ. P. 12(b). Having reviewed the parties' memoranda and exhibits, and heard oral argument on the motions, this Court holds that the Ordinance does not violate the First Amendment or Article 40 for the reasons set forth in this memorandum opinion.

FACTS

On May 27, 1993, the Maryland legislature amended Section 222 of the Alcoholic Beverage Statute ("the Maryland Statute") to delegate to the Mayor and City Council of Baltimore the authority to adopt an ordinance restricting outdoor advertisements of alcoholic beverages in Baltimore City if the Mayor and City Council determine the ordinance is "necessary for the promotion of the welfare and temperance of minors." Md. Alco. Bev. Code Ann. §§ 222 and 222(c) (1993). The Maryland Statute exempts from regulation neon or other electric signs in the windows of premises licensed to sell alcohol, signs on MTA vehicles and taxicabs, signs on commercial vehicles used for transporting alcoholic beverages, signs at Memorial Stadium and any property owned, leased or operated by the Maryland Stadium Authority, and signs on property next to interstate highways. Md. Alco. Bev. Code Ann. § 222(c)(2).

Pursuant to its authority under the Maryland Statute, the City enacted the Ordinance on January 6, 1994, which bans, with certain exceptions, the display or ad-

vertisement of alcoholic beverages on billboards in publicly visible locations. The Ordinance contains a lengthy Preamble in which the City describes the problem of underage drinking in the City and asserts that such regulation is necessary to promote the welfare and temperance of minors exposed to such advertisements. The City Council enacted the Ordinance after holding a public hearing on the issue on November 17, 1993, at which private citizens, public officials, experts on advertising, legal scholars, and representatives of Anheuser-Busch and Penn Advertising testified.

Prior to the date the Ordinance took effect, Anheuser-Busch and Penn Advertising brought suit alleging that the Ordinance is unconstitutional.

DISCUSSION [1]

Summary judgment will be granted when no genuine dispute of material fact exists and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). In considering the City's motion, the Court views the underlying facts and all reasonable inferences drawn therefrom in the light most favorable to the parties opposing summary judgment. *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

While the First Amendment [2] guards against unwarranted infringements on commercial speech, it is a well

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[1] Because this Court is prepared to rule on whether the Ordinance violates the First Amendment, the Motion for a Preliminary Injunction is moot. Therefore, this memorandum opinion will focus on the Motion to Dismiss.

[2] The limits on governmental restrictions of speech contained in Article 40 of the Maryland Declaration of Rights are identical to those set forth in the First Amendment. *Freedman v. State*, 233 Md. 498, 197 A.2d 232 (1964), *rev'd on other grounds*, 380 U.S. 51 (1965). Therefore, although this memorandum opinion focuses on the First Amendment challenge, the holding of this Court applies equally to Article 40.

settled principle that "commercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression." *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978).

The Supreme Court in *Central Hudson* set forth the test for assessing the constitutionality of restrictions on commercial speech:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 566 (1980).

In this case, the parties concur that the advertising at issue is not unlawful or misleading, and that the City's interest in promoting the welfare and temperance of minors is substantial, thereby satisfying the first and second prongs of the *Central Hudson* test. The parties dispute at length whether the Ordinance complies with the third and fourth prongs of the test.[3]

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[3] The City contends that as an exercise of the State's plenary power to regulate the sale of alcohol pursuant to the Twenty-first Amendment, the Ordinance is valid if rationally related to a legitimate government interest. Alternatively, the City asserts that the Ordinance passes the more stringent test for restrictions on commercial speech enunciated in *Central Hudson*, 447 U.S. 557. Because the Ordinance complies with the *Central Hudson* test, an examination of the interplay between the Twenty-first Amendment and restrictions on commercial speech is unnecessary.

Direct Advancement

In *Edenfield v. Fane,* 113 S.Ct. 1792 (1993), the Supreme Court revisited the *Central Hudson* test for commercial speech and concluded that to withstand a First Amendment challenge, the state must demonstrate that "its restriction serves a substantial state interest and is designed in a reasonable way to accomplish that end." *Id.* at 1799. The Supreme Court cautioned that mere assertion that a regulation directly advances an asserted interest is insufficient to justify it. Under the *Central Hudson* test, "[t]his burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree." *Id.* at 1800.

In *Edenfield,* a Certified Public Accountant ("CPA") challenged a Florida ban on in-person solicitation by CPAs, promulgated by the Florida Board of Accountancy, as a violation of his rights under the First and Fourteenth Amendments. In striking down the prohibition, the Supreme Court recognized the substantial governmental interest in protecting consumers from fraud or overreaching by CPAs and in maintaining CPA independence in performing their professional duties. However, the Court held that the Florida Board had failed to demonstrate that the ban against solicitation "advance[d] its asserted interests in any direct and material way." *Id.* at 1800.

In invalidating the restriction, the Supreme Court focused on the Board's failure to present any studies, anecdotal evidence, or individual conduct to support its contention that the ban was necessary to prevent the alleged harm that personal solicitation by CPAs created. The only evidence that the Board presented to support the need for its regulation was an affidavit by a former Chairman of the Florida Board that concluded that the solicita-

tion ban was necessary. In evaluating the Board's proffered evidence, however, the Supreme Court discounted the affidavit, which "contain[ed] nothing more than a series of conclusory statements that add little if anything to the Board's original statement of its justifications." *Id.* at 1800-01. The Court also reviewed a report on CPA solicitation and literature on the accounting profession, which contradicted the Board's concern. *Id.* at 1801.

The City maintains that *Edenfield* does not modify the deference that this Court should afford the legislature under *Central Hudson* when evaluating restrictions on commercial speech. In repeated litigation over the constitutionality of ordinances that restrict the placement of billboards, the Supreme Court has deferred to a legislative judgment that a link exists between billboards and traffic safety. In *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), for example, the Supreme Court upheld San Diego's ban on off-site billboard advertising under the *Central Hudson* test. Although the record failed to establish a connection between billboards and traffic safety, the Court nonetheless upheld the restriction, reasoning: "We likewise hesitate to disagree with the accumulated, commonsense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety. There is nothing here to suggest that these judgments are unreasonable." *Id.* at 509 (footnote omitted).

The City urges this Court to follow the Fifth and Tenth Circuits in deferring to a legislative judgment that a link exists between alcohol advertising and consumption when evaluating the Ordinance under *Central Hudson*. Prior to *Edenfield*, the Fifth Circuit upheld a Mississippi law banning liquor advertising by local, in-state media despite the absence of concrete data to support such a link in *Dunagin v. Oxford*, 718 F.2d 738 (5th Cir.

1983), *cert. den.*, 467 U.S. 1259 (1984): "Whether we characterize our disposition as following the judicial notice approach taken in *Central Hudson Gas*, or following the 'accumulated, common-sense judgment' approach taken in *Metromedia*, we hold that sufficient reason exists to believe that advertising and consumption are linked to justify the ban, whether or not 'concrete scientific evidence' exists to that effect." *Id.* at 750.

In *Oklahoma Telecasters Association v. Crisp*, 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds sub nom., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), the Tenth Circuit likewise deferred to a legislative judgment linking alcohol advertising and consumption in upholding a prohibition against the broadcasting of advertisements for alcoholic beverages. The Tenth Circuit relied on the plurality's language in *Metromedia* and a lesser standard of review under the Twenty-first Amendment [4] to hold "as a matter of law, that prohibitions against the advertising of alcoholic beverages are reasonably related to reducing the sale and consumption of those beverages and their attendant problems." *Id.* at 501.

Anheuser-Busch and Penn Advertising contend that the City's continued reliance on the earlier cases of *Dunagin* and *Crisp*, in light of the Supreme Court's recent decision in *Edenfield*, are misplaced. Instructed by the Supreme Court that absolute deference to a legislative judgment is no longer appropriate when regulating commercial speech, Anheuser-Busch and Penn Advertising argue that the City must demonstrate that the Advertising Ban will reduce underage drinking in a direct and material way in order to withstand constitutional scrutiny. According to Anheuser-Busch, "*Edenfield* requires the judiciary to undertake a thorough and searching evaluation of a legislature's self-serving or presumed conclusion that its pro-

[4] *See* note 3, *supra*.

posed restriction on commercial speech will directly advance a substantial government interest. 113 S.Ct. at 1800." Memorandum of Law in Support of Motion for Preliminary Injunction, pp. 22-23. Anheuser-Busch and Penn Advertising contend that *Edenfield* requires this Court to conduct a hearing and allow the parties to develop a more extensive record before the Court may rule on the constitutionality of the Ordinance.

This Court, however, is unable to find any language in *Edenfield* that specifies the precise level of scrutiny with which this Court must review the Ordinance. *Edenfield* requires only that the government "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." 113 S.Ct. at 1800. The opinion does not contain any reference to an evidentiary hearing. This Court has reviewed the numerous exhibits submitted by all parties, which are part of the record in this case. At the motions hearing, the parties were unable to persuasively articulate the benefit that an evidentiary hearing would bring to resolution of this case. Therefore, in light of the extensive record that the parties have already established in this case, this Court concludes that an evidentiary hearing is not necessary.

Shortly after the Supreme Court issued its decision in *Edenfield*, it affirmed the role of judicial deference to legislative judgments in the area of commercial speech. In *U.S. v. Edge Broadcasting Co.*, 113 S. Ct. 2696 (1993), Edge, the owner and operator of a North Carolina radio station, challenged a federal statute that prohibited radio broadcast of lottery advertising by licensees located in nonlottery states as a violation of the First Amendment. Congress has enacted the federal statute to assist States in controlling this form of gambling. Since Edge broadcasted from near the Virginia-North Carolina border, 90% of his listeners were in Virginia, which sponsors a lottery. Edge's remaining listeners were in North

Carolina, a nonlottery state. Seeking to broadcast Virginia lottery advertisements, Edge brought suit alleging that the statute, as applied to him, violated the First Amendment.

In assessing the restriction under *Central Hudson*, the Supreme Court found that the exclusion of gambling advertisements from 11% of the radio listening time in the area directly served North Carolina's interest in upholding its ban on gambling. *Id.* at 2706. The Court rejected the broadcaster's argument that the regulation's failure to shield North Carolina residents from all advertising and information on lotteries rendered it ineffective. The Court acknowledged the propriety of a legislative judgment that advertising increases consumption, and the judicial deference that such a judgment warrants:

> Within the bounds of the general protection provided by the Constitution to commercial speech, we allow room for legislative judgments. Here, as in *Posadas de Puerto Rico*, the Government obviously legislated on the premise that the advertising of gambling serves to increase the demand for the advertised product. Congress clearly was entitled to determine that broadcast of promotional advertising of lotteries undermines North Carolina's policy against gambling, even if the North Carolina audience is not wholly unaware of the lottery's existence. Congress has, for example, altogether banned the broadcast advertising of cigarettes, even though it could hardly have believed that this regulation would keep the public wholly ignorant of the availability of cigarettes.

Id. at 2707 (citations omitted).

The handful of lower courts that have considered the impact of the recent Supreme Court decisions involving commercial speech on *Central Hudson* have recognized a legislative judgment that advertising increases consump-

tion. In *Cal-Almond, Inc. v. U.S. Department of Agriculture*, 1993 Westlaw 526908 (9th Cir. December 22, 1993), almond handlers challenged the collection of assessments by the California Almond Board to conduct general almond advertising. In discussing the validity of the assessment-funded almond promotion program, the Ninth Circuit adhered to the judicial recognition that a link exists between advertising and consumption. Despite *Edenfield*'s general instruction to evaluate the government's interests and the harms it seeks to avoid, the Ninth Circuit noted: "[t]he Supreme Court assumes as a matter of law that advertising increases consumption of the product or service being advertised . . . Therefore, we may reasonably assume that the Board's promotional efforts have some positive effect on almond demand." *Id.* at *8 (citations omitted).

In *New York State Association of Realtors v. Shaffer*, 833 F. Supp. 165 (E.D.N.Y. 1993), an association of real estate brokers sought a declaratory judgment that a statute authorizing the Secretary of State to issue "nonsolicitation" orders, which prevented real estate brokers from directly soliciting clients, was unconstitutional. The asserted purpose of the nonsolicitation orders was to prevent "blockbusting," where individuals prey on the fears of property owners in racially transitional areas, thereby producing panic selling and instability in the community. The Eastern District of New York granted summary judgment to defendants, holding that the statute and attendant regulations did not violate the First Amendment.

In determining whether the regulation directly advanced the government's asserted interest, the District Court reviewed the *Edenfield* opinion for guidance. The District Court focused on the Supreme Court's search for any studies, anecdotal evidence, or individual conduct in *Edenfield* to demonstrate the alleged harm that accountant solicitation created. *Id.* at 179. Although New York

failed to present extensive studies to show the existence of the harm it sought to regulate, the District Court held in *Shaffer* that generalized anecdotal evidence of the evil that blockbusting presented satisfied the third prong of *Central Hudson*: "In reviewing the totality of the evidence presented in this case, the Court finds that there is sufficient evidence of blockbusting. Accordingly, the Court finds that Section 442-h furthers the governmental interest of combatting the invidious practice of blockbusting." *Id. Shaffer* thus differed from *Edenfield* in that the court found evidence of the harm that blockbusting created in the former, while no comparable evidence of the alleged harm flowing from CPA solicitation existed in the latter. Like defendants in *Shaffer*, the City has presented extensive evidence of the harm that underage drinking presents in Baltimore City.

In support of its contention that *Edenfield* requires a more searching inquiry than previously had been required, Anheuser-Busch and Penn Advertising cite two recent cases that invalidated advertising restrictions on alcohol after a hearing. In *Adolph Coors Co. v. Bentsen*, 2 F.3d 355 (10th Cir. 1993), the Tenth Circuit held that a regulation prohibiting statements of alcohol content on malt beverage labels violated the First Amendment. The government contended that the purpose of the regulation was to prevent strength wars among competing manufacturers. In invalidating the regulation, the court noted: "[t]he critical question is whether the evidence shows the required relationship between the labeling prohibition that Coors is challenging and the threat of strength wars." *Id.* at 358.

In *Coors*, the government relied primarily on anecdotal evidence that manufacturers were already competing and advertising on the basis of alcohol strength. However, the government failed to provide any evidence to show that factual statements of alcohol content contributed to these strength wars, rather than the more descriptive terms used

to advertise alcohol strength. Also, the government presented no evidence to indicate that strength wars existed where alcohol content labeling was required. The Tenth Circuit thus concluded that "the government has offered no evidence to indicate that the appearance of factual statements of alcohol content on malt beverage labels would lead to strength wars or that their continued prohibition helps to prevent strength wars. Instead, it has offered only inferential arguments that are based on mere speculation and conjecture and fails to show that the prohibition advances the Government's interest in a direct and material way." *Id.* at 359.

In *44 Liquor Mart v. Racine,* 829 F. Supp. 543 (D.R.I. 1993), the Rhode Island District Court struck down a state statute prohibiting off-premises price advertisements of alcoholic beverages because the state had failed to establish that the ban on price advertisements directly advanced its interest in reducing alcohol consumption. After evaluating the expert testimony and research results, the court concluded that the ban on price advertisements had no significant impact on alcohol consumption in the state.

The District Court in *44 Liquor Mart* repeatedly distinguished between a restriction on price advertising and a general ban on alcohol advertising, the ordinance at issue in this case. Although the court referenced the Supreme Court's recognition in *Edge* that an immediate connection exists between advertising and demand in lottery gambling, it noted that "the regulations at issue in this case make no attempt to reduce the amount of alcohol advertising, but merely proscribe the dissemination of truthful price information." 829 F. Supp. at 553 n.10. The court twice declined to rule on the constitutionality of a total or partial ban on alcohol advertising. *Id.* at 549 n.6 and 553 n.10.

Coors and *44 Liquor Mart* thus differ from the instant case with respect to the type of link between the regula-

tion and the asserted governmental interest. A link between statements of alcohol content and strength wars, or between price advertisements and alcohol consumption is, at best, tenuous. Although advertisements of alcohol content or price may influence the particular brand that a consumer chooses, they are unlikely to persuade one who does not otherwise consume alcoholic beverages to indulge. In contrast, a link between general advertising and overall consumption is more immediately apparent. *See, e.g., Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico,* 478 U.S. 328, 342 (1986) ("We think [that] the legislature's belief [that advertising of casino gambling would serve to increase the demand for the product advertised] is a reasonable one"); *Central Hudson,* 447 U.S. at 569 ("[t]here is an immediate connection between advertising and demand for electricity.")

The Supreme Court and the Ninth Circuit have affirmed the propriety of deferring to a legislative judgment that a causal connection exists between advertisements and alcohol consumption even after *Edenfield. See Edge,* 113 S.Ct. at 2707; *Cal-Almond,* 1993 Westlaw 526908 at *8. Moreover, the District Court in *44 Liquor Mart* repeatedly distinguished its case from those where a link between advertising and consumption was self-evident, the exact scenario present in this case:

> Unlike a number of cases in the commercial speech area, the link between alcohol price advertising and increased per-capita consumption is not self-evident. *See, e.g., Posadas,* 478 U.S. at 341-42, 106 S.Ct. at 2976-77 (link between ban on gambling advertiseing and level of gambling self-evident); *Central Hudson,* 447 U.S. at 569, 100 S.Ct. at 2353 (link between advertising ban and sales self-evident); *Dunagin v. Oxford,* 718 F.2d at 747-49 & n.8 (link between overall advertising and increased alcohol use deemed self-evident).

829 F. Supp. at 554.

In fact, the City has exceeded the required level of proof under *Central Hudson* by submitting further evidence in support of the Ordinance. Despite the judicially recognized "self-evident" proposition that advertising increases consumption, and the deference that a legislative judgment to that effect warrants, the City has submitted various studies that establish a connection between alcohol advertising and adolescents' attitudes toward alcohol, and between alcohol advertising and consumption. The City Council, an elected legislative body, also conducted a public hearing on the Ordinance prior to its enactment at which several private citizens, public officials, experts in advertising, attorneys, and representatives of Anheuser-Busch and Penn Advertising spoke.

In response, Anheuser-Busch and Penn Advertising have submitted various studies that refute the existence of a connection between alcohol advertising and consumption among adults or adolescents, and critiques of the studies that show an affirmative link between advertising and consumption. Anheuser-Busch maintains that the purpose of its advertising is not to increase overall consumption, but merely to increase its market share of a constant pool of those who have already decided to consume alcohol. Castellano Aff. ¶ 20. As the Fifth Circuit aptly stated in *Dunagin*, however:

> It is beyond our ability to understand why huge sums of money would be devoted to the promotion of sales of liquor without expected results, or continue without realized results. No doubt competitors want to retain and expand their share of the market, but what businessperson stops short with competitve comparisons? It is total sales, profits, that pay the advertiser; and dollars go into advertising only if they produce sales. Money talks: it talks to the young and the old about what counts in the marketplace of our society.

718 F.2d at 749.

In light of the Supreme Court's continued deference to a legislative judgment that advertising increases consumption, even after *Edenfield*, this Court finds that the Ordinance directly advances the City's asserted interest in promoting the welfare and temperance of minors.

Narrowly Tailored

In *Board of Trustees v. Fox*, 492 U.S. 469 (1989), the Supreme Court explained that the fourth prong in the *Central Hudson* test requires only that the regulation be reasonable to withstand constitutional scrutiny:

> What our decisions require is a "fit" between the legislature's ends and the means chosen to accomplish those ends—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interests served; that employs not necessarily the last restrictive means but, . . . a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

Id. at 480 (internal quotations and citations omitted).

In declining to impose a "least restrictive means" requirement, the Supreme Court acknowledged in *Fox* "the difficulty of establishing with precision that point at which restrictions become more extensive than their objective requires, and provide the Legislative and Executive Branches needed leeway in a field (commercial speech) 'traditionally subject to governmental regulation,' " *Id.* at 481 (quoting Ohralik v. Ohio State Bar Assn., 436 U.S. at 455-56).[6] An intermediate level of scrutiny thus rec-

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[6] The party that seeks to uphold a restriction on commercial speech must affirmatively show that a reasonable fit exists between the regulation and the asserted interest. *Fox*, 492 U.S. at 480.

ognizes the latitude that decisionmakers require to address widespread social problems.

In *Cincinnati v. Discovery Network, Inc.*, 113 S.Ct. 1505 (1993), the Supreme Court invalidated a city ordinance because no reasonable fit existed between the regulation and the asserted interest. Motivated by its concern for safety and aesthetics, Cincinnati used a preexisting ordinance, which prohibited distribution of "commercial handbills" on public property, to remove offensive newsracks containing commercial handbills. In concluding that the ordinance violated the First Amendment, the Court held that the city had failed to establish the necessary "reasonable fit" between its legitimate interest in safety and aesthetics and the means that it had chosen to pursue that interest. Removal of 62 newsracks containing commercial speech pursuant to the ordinance ignored 1,500 to 2,000 similar newsracks that contained noncommercial speech, even though the remaining newsracks created identical aesthetic and safety problems. *Id.* at 1510. Therefore, the Court concluded that the distinction that Cincinnati had drawn between newsracks dispensing commercial handbills and those dispensing noncommercial speech had no bearing on its asserted interests. *Id.* at 1516.

The Court reiterated its view in *Discovery Network* that "reasonable fit" involves a more searching inquiry than rational basis review, but one less rigorous than "least restrictive means." Consideration of alternatives is a factor in determining "reasonable fit": "A regulation need not be absolutely the least severe that will achieve the desired end, but if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable." *Id.* at 1510 n.13 (internal quotations and citation omitted).

Anheuser-Busch and Penn Advertising argues that the Ordinance fails to satisfy the fourth prong of the *Central*

Hudson test because alternative, less burdensome means exist to reduce underage drinking, such as increased enforcement of existing laws against underage drinking and heightened campaigns to educate adolescents about alcohol consumption.

The mere suggestion of alternatives, however, does not conclusively establish that the City's chosen means are not narrowly tailored; a reasonable fit is all that is necessary: "A judge need not agree with the decisionmaker as to the most appropriate method for promoting a governmental interest, as long as there is a reasonable fit between the restriction and the interest served, the manner of regulation is left to the decisionmaker." *Destination Ventures v. F.C.C.*, 1994 Westlaw 49486, *7 (D. Or. January 20, 1994) (citations omitted). In other words, although consideration of alternatives is an element of "reasonable fit," it is not dispositive.

Anheuser-Bush and Penn Advertising further assert that the Ordinance is not narrowly tailored because its numerous exceptions make the net reduction of the number of alcohol advertisements to which children are exposed minute. The Supreme Court, however, has rejected the need for a regulation to address every source of harm in order to withstand constitutional scrutiny. In *Edge*, the Court stated:

> Nor do we require that the Government make progress on every front before it can make progress on any front. If there is an immediate connection between advertising and demand, and the federal regulation decreases advertising, it stands to reason that the policy of decreasing demand for gambling is correspondingly advanced. Accordingly, the Government may be said to advance its purpose by substantially reducing lottery advertising, even where it is not wholly eradicated.

Edge, 113 S.Ct. at 2707.

Anheuser-Busch and Penn Advertising also contend that the Ordinance is invalid because the City may not deprive adults of their right to receive information flowing from commercial advertisements of alcohol in order to protect minors. They cite *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73-75 (1983), in which the Supreme Court invalidated a federal statute that prohibited the mailing of unsolicited advertisements for contraceptives, to support their proposition.

In *Bolger*, however, the Supreme Court recognized that the govermental interest in protecting children may in some instances justify special treatment. *Id.* at 74. Citing *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), which upheld a restriction on broadcasting in order to protect children, the Court emphasized the narrowness of that holding based on the uniquely pervasive and accessible nature of the broadcasting medium. *Id.* In distinguishing *Bolger* from *Pacifica*, the Court found that "[t]he receipt of mail is far less intrusive and uncontrollable" than broadcasting. *Id.* The Court noted that parents already exercise substantial control over mail once it enters their mailboxes and are entitled under a federal statute to limit their receipt of sexually provocative material. Therefore, an additional regulation prohibiting unsolicited advertisements on contraceptives was unnecessary. *Id.* at 73.

As in the broadcasting context, parents are similarly unable to control their children's exposure to outdoor billboard advertisements of alcoholic beverages. The Supreme Court recognized in *Packer Cororation v. Utah*, 285 U.S. 105 (1932), the unique nature of outdoor advertisements:

> Advertisements of this sort are constantly before the eyes of observers on the streets . . . to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message

> of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard . . . .

Id. at 110 (internal quotations omitted).

For the foregoing reasons, this Court finds that a reasonable fit exists between the Ordinance and the City's asserted interests, thereby satisfying the fourth prong of *Central Hudson.*

Public Service Announcements

Anheuser-Busch and Penn Advertising challenge the Ordinance, as applied, as unconstitutional due to its overbreadth because it impermissibly restricts their noncommercial speech in violation of the First Amendment. After baldly asserting that their Public Service Announcements ("PSAs") constitute noncommercial speech, they contend that the Ordinance must pass strict scrutiny as applied to the PSAs.

This Court notes initially that whether PSAs actually constitute noncommercial speech is arguable. Although manufacturers and advertisers purport to sponsor PSAs for the public welfare, the success of PSAs in promoting their sponsors is undeniable. By containing identifying logos or trade names, PSAs enhance the goodwill of a company, thereby advancing its selling potential. Were companies solely motivated to contribute to the public welfare, the PSAs that they sponsor would be anonymous.

However, for the purposes of this action, this Court assumes without deciding that legitimate PSAs are fully protected speech, to which the Ordinance does not apply, based on the City's concession that PSAs do not constitute commercial speech. City's Reply Memorandum in

support of its Motion to Dismiss, p. 5. To the extent that manufacturers and advertisers attempt to mask advertisements as PSAs, however, those advertisements are subject to the Ordinance's restriction. Therefore, the "as applied" challenge to the Ordinance is misplaced.

Anheuser-Busch and Penn Advertising assert that their challenge to the Ordinance, as applied to their PSAs, is currently ripe for consideration. They allege that to force manufacturers and advertisers to wait until the City prosecutes them before they may raise the defense that the Ordinance is unconstitutional as applied will not adequately vindicate their First Amendment rights because the threat of prosecution may "chill" protected speech almost as severely as the actual imposition of sanctions. *See Babbitt v. United Farm Workers Nat. Union,* 442 U.S. 289, 298 (1979); *Dombrowski v. Pfister,* 380 U.S. 479, 485-87 (1965). As stated above, however, this Court assumes without deciding that the Ordinance does not apply to legitimate PSAs. This Court will not render an advisory opinion solely to distinguish between legitimate PSAs and true advertisements.

Penn Advertising further alleges that the Advertising Ban is unconstitutional because it is vague and delegates standardless discretion to those who are to enforce the Ordinance. As a matter of due process, a law is facially void if it is so vague that persons "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.,* 269 U.S. 385, 391 (1926). The test of whether a statute is vague is an objective one. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 501 (1982).

Penn Advertising professes its ignorance of the meaning of the phrase, "No person may place any sign . . . or any other form of advertising that advertises alcoholic beverages in publicly visible locations." Penn Advertis-

ing contends that the Court must determine initially which of its signs constitute "advertisement," and thus are subject to the Ordinance, and which are exempt PSAs.

As stated above, this Court assumes without deciding that some legitimate PSAs exist that fall outside the scope of the Ordinance. Advertising that attempts to bypass the Ordinance by hiding under the cloak of a PSA, however, is fully subject to the ban. A sign that prominently displays a manufacturer's logo and product, for example, is clearly advertising subject to the Ordinance despite the nominal attempt to characterize it as a PSA. For a company that deals specifically with advertising to now allege that it does not know what the term "advertising" means is, in this Court's view, disingenuous. Penn Advertising, if anyone, is well versed in the subtleties of the advertising industry, and knows when it attempts to predominantly advance sales rather than enhance the public welfare. By the plain meaning of the terms, then, the scope of the restriction is clear; it covers all "advertising" of alcoholic beverages in publicly visible locations. Since a person of ordinary intelligence reasonably could be expected to determine what signs constitute advertisement, the language of the Ordinance is not impermissibly vague.

Penn Advertising also argues that the Ordinance unconstitutionally favors certain categories of noncommercial speech over other noncommercial speech, and certain categories of commercial speech over certain noncommercial speech. According to Penn Advertising, the exceptions contained in the Ordinance that permit advertising to occur in certain specified locations while banning PSAs from manufacturers of alcoholic beverages in nonexempt publicly visible locations, and that allow generic alcoholic beverage advertisements make the Ordinance unconstitutionally discriminatory. In advancing this argument, Penn Advertising relies on *Cincinnati v. Discovery Network*, 113 S.Ct. 1505.

Unlike the situation in *Discovery Network*, however, the distinction between permitted and prohibited advertisements in this Ordinance rests on the effect that different mediums have on adolescents. While adolescents may see an advertisement for alcoholic beverages at Camden Yards while watching a baseball game, their exposure to that advertisement ends when the game ends. An advertisement on an MTA vehicle or taxicab likewise presents only a fleeting image of an alcoholic beverage. In contrast, a billboard is a constant fixture in a neighborhood. It looms over children every day while they walk to school, and every time they play in their neighborhood, thus forming an inescapable part of their daily life. The Supreme Court aptly characterized the unique nature of outdoor billboards: "Advertisements of this sort are constantly before the eyes of observers on the streets . . . to be seen without the exercise of choice or volition on their part." *Packer*, 285 U.S. at 110 (internal quotations omitted). Billboard advertisements thus form a constant impetus to consume the product being advertised, the precise goal of the advertisement.

Furthermore, despite protestations to the contrary, the reality is that billboard advertisements for alcoholic beverages focus on depressed inner-city neighborhoods. Billboards are conspicuously absent from more affluent communities. They present a stark contrast to adolescents between the lifestyle depicted in the advertisement and the actual neighborhood surrounding them, thereby enhancing the attractiveness of the advertised product. The distinction among various mediums thus appropriately accounts for the difference in their treatment.

Penn Advertising's final argument is that the City exceeded the authority that the Maryland statute granted it to enact the Ordinance because the City failed to show that the restriction is necessary to promote the welfare and temperance of minors. In effect, Penn Advertising

seeks to bypass any deference that the Court may afford the legislature pursuant to the Twenty-First Amendment by raising this statutory argument as a separate Count, in which the Twenty-First Amendment does not apply. Because the Court has upheld the Ordinance under *Central Hudson,* however, without reference to the effect of the Twenty-First Amendment on the City's authority to regulate commercial speech, this argument in effect simply involves an analysis of whether the regulation "directly advances" the City's asserted interest and whether a reasonable fit exists between the regulation and the governmental interest.

Conclusion

For the reasons stated above, the Court holds that Article 30, Section 10.0-1H and Article 30, Section 11.0-7 of the Baltimore City Code, as promulgated by Bill No. 626 does not violate the First Amendment to the Constitution or Article 40 of the Maryland Declaration of Rights.

In accordance with this memorandum opinion, it will be so ordered.

/s/ John R. Hargrove
JOHN R. HARGROVE
Senior United States
District Judge

Date 3/28/94

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action Nos. HAR 94-117
HAR 94-145

ANHEUSER-BUSCH, INC., and
PENN ADVERTISING OF BALTIMORE, INC.,
Plaintiffs,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY, *et al.*,
Defendants.

ORDER

For the reasons set forth in the attached Memorandum Opinion, this Court holds that Article 30, Section 10.0-1H and Article 30, Section 11.0-7 of the Baltimore City Code, as promulgated by Bill No. 626, does not violate the First Amendment to the Constitution or Article 40 of the Maryland Declaration of Rights.

Therefore, IT IS this 28th day of March, 1994, by the United States District Court for the District of Maryland, hereby ORDERED:

1. That Defendants' Motion to Dismiss BE, and the same hereby IS, GRANTED.

2. That the Clerk of the Court CLOSE this case.

3. That the Clerk of the Court mail copies of this Order to all parties of record.

/s/ John R. Hargrove
JOHN R. HARGROVE
Senior United States
District Judge

APPENDIX E

[Filed December 10, 1996]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 94-1431(L)
94-1432
CA-94-117-HAR

ANHEUSER-BUSCH, INCORPORATED,
Plaintiff-Appellant

v.

KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; MAYOR AND CITY COUNCIL OF BALTIMORE CITY; CITY COUNCIL OF BALTIMORE CITY; DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement,
Defendants-Appellees

and

JOHN JOSEPH CURRAN,
Attorney General of the State of Maryland,
in his official capacity,
Defendant

THE ASSOCIATION OF NATIONAL ADVERTISERS, INCORPORATED; THE AMERICAN ASSOCIATION OF ADVERTISING AGENCIES; THE MEDIA INSTITUTE; NATIONAL ASSOCIATION OF BROADCASTERS; THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION; WASHINGTON LEGAL FOUNDATION; CENTER FOR SCIENCE IN THE PUBLIC INTEREST; COALITION FOR BEAUTIFUL NEIGHBORHOODS; BALTIMORE CITY WIDE LIQUOR COALITION FOR BETTER LAWS AND REGULATIONS,
Amici Curiae

On Petition for Rehearing with
Suggestion for Rehearing In Banc

The appellant filed a petition for rehearing with suggestion for rehearing in banc.

Senior Judge Butzner voted to grant panel rehearing. Judge Niemeyer and Judge Hamilton voted to deny.

No member of the Court requested a poll on the suggestion for rehearing in banc.

The Court denies the petition for rehearing with suggestion for rehearing in banc.

Entered at the direction of Judge Niemeyer for the Court.

For the Court,

/s/ Patricia S. Connor
Clerk

APPENDIX F

Baltimore Ordinance No. 288 (City Council Bill 626):

AN ORDINANCE Concerning

ZONING CODE—ADVERTISING
ALCOHOLIC BEVERAGES

FOR the purpose of restricting the placement of outdoor advertisements for alcoholic beverages; and providing a penalty.

BY adding

Article 30—Zoning
Chapter 10—Sign Regulations
Section 10.0-1h
Baltimore City Code (1983 Replacement Volume, as amended)

By repealing and reordaining with amendments

Article 30—Zoning
Chapter 11—Administration and Enforcement
Section 11.0-7
Baltimore City Code (1983 Replacement Volume, as amended)

Preamble

WHEREAS, Section 400-403A of Article 27 of the Maryland Code make it unlawful for any person under the age of 21 years to obtain, possess or control any alcoholic beverages in the State of Maryland, and section 118 of Article 2B of the Maryland Code prohibits the sale or furnishing of any alcoholic beverages to a person under 21 years of age by any licensee authorized to sell such products in the State of Maryland; and

WHEREAS, Alcoholic beverages are the second most heavily advertised products in America (after cigarettes), and the alcoholic beverages industry spends more than

$100 million annually for outdoor advertising of its products; and

WHEREAS, Outdoor advertisements are a unique and distinguishable medium of advertising which subjects the general public to involuntary and unavoidable forms of solicitation, as the Supreme Court recognized in *Packer Corporation v. Utah,* 285 U.S. 105 (1932) by citing with approval the following excerpt from the opinion of the Utah Supreme Court:

> "Advertisements of this sort are constantly before the eyes of observers on the streets . . . to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by the one who is to see and read the advertisement. The radio can be turned off, but not so the billboard. . . . These distinctions clearly place this kind of advertisement in a position to be classified so that regulations or prohibitions may be imposed upon all within the class. This is impossible with respect to newspapers and magazines."

WHEREAS, The Supreme Court and other courts have recognized the positive relationship between advertising and consumption as regards a variety of goods and services, such as electricity, *see Central Hudson Gas & Elec. v. Pub. Serv. Comm'n,* 447 U.S. 557, 569 (1980) ("There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales."); gambling, *see Posades de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico,* 478 U.S. 328, 341-42 (1986) ("The Puerto Rico Legislature obviously believed, when it enacted the advertising re-

strictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable one . . . . "[)]; cigarettes, *see Capital Broadcasting Co. v. Mitchell,* 33 F. Supp. 582, 586 (D.D.C. 1971) (three-judge court) (noting "close relationship between cigarette commercials broadcast on the electronic media and their potential influence on young people."), *aff'd per curiam,* 405 U.S. 1000 (1972); and alcohol, *see Dunagin v. City of Oxford,* 718 F.2d 738, 747-51 (1983) (extensively reviewing evidence on connection between liquor advertising and consumption and rejecting inter-brand competition argument), *cert. den.,* 104 S.Ct. 3533 (1984); and

WHEREAS, In addition to judicial recogniton of the general link between advertising and consumption, a report by the Prevention Committee of Governor William Donald Schaefer's Drug and Alcohol Abuse Commission on "The Impact of Alcohol Advertising and the Use of Alcohol in Television Programs and Films on Underage Drinking" (January, 1993) concluded:

> Research consistently showed that children's attitudes favorable to alcohol are significantly related to their exposure to alcohol advertisements.
>
> Specific alcoholic beverage advertising practices such as use of cartoon characters and animals (*e.g.,* "Spuds McKenzie") that are especially appealing to children and youth, using rock stars and athletes as spokespersons, and associating drinking with sports and other activities that have a great appeal to youth such as race car driving, rock climbing, water sports, etc. greatly contribute to attitudes favorable to alcohol among youth.
>
> Children are exposed to billboards advertising alcohol on a regular basis simply by walking to school or playing in their neighborhoods, and there is no

practical means of parental monitoring or limiting of exposure to these public advertisements.

The "overwhelming majority" of research studies showed a definite correlaton between alcohol advertising and underage drinking.

Glamorous "lifestyle" alcoholic beverage advertisements have a "profound influence" on young people's attitudes about alcohol.

Research shows that when children's exposure to alcohol advertising increases they:

perceive drinking as more attractive, acceptable and rewarding;

view drinkers more positively (i.e., more friendly, relaxed, fun-loving, happy, sophisticated, etc.);

are more likely to see beer drinking as "cool" and "macho";

are more likely to believe that drinking is a way to relax and deal with stress;

are more likely to agree that it is okay for teenagers to drink;

are more likely to name alcohol than water as an appropriate beverage for adults; and

have increased expectations to drink in the future.

A variety of studies indicate that alcohol is involved in at least one-half of all the major causes of death among youth: motor vehicle crashes, suicides, homicides, drowning and other accidents. Alcohol-related accidents are now the leading cause of death among young people; and

WHEREAS, The 1992 Maryland Adolescent Drug Survey conducted by the Maryland Department of Education found that:

> 11.8% of 6th graders, 26.2% of 8th graders, 40.8% of 10th graders, and 52.9% of 12th graders reported use of alcohol within the past 30 days. Of these children, 1.9% of 6th graders, 6.3% of 8th graders, 19.9% of 10th graders and 32.4% of 12th graders reported binge drinking (5 or more servings) within the past 30 days.
>
> Over 25% of eighth graders report being in a car driven by someone under the influence of alcohol; that figure exceeds 60% by the 12th grade.
>
> Nearly 40% of students reported that they themselves have driven within one hour of consuming one to four alcoholic beverages on at least one occasion within the past year.
>
> Alcohol is overwhelmingly and consistently the most widely used drug at all adolescent age levels.
>
> Alcohol is a "gateway" drug among Maryland students, *i.e.*, a substance often used by adolescents as a first drug which appears to "open the door" for use of harder drugs at a later date; and

WHEREAS, Accordingly [sic] to 1992 reports by then U.S. Surgeon General, Dr. Antonia Novello ("Youth and Alcohol: Dangerous and Deadly Consequences") and then U.S. Inspector General, Richard Kusserow ("Youth and Alcohol: Drinking and Crime"):

> about one-third of all juvenile males arrested said they had used alcohol in the previous 72 hours.
>
> nearly 40% of youths in adult correctional facilities reported drinking before committing the crime.
>
> 18% of high school females and 39% of high school males say that "it's okay to force sex if the girl is drunk."

a "striking association" exists between alcohol use and using firearms to commit suicide by 10-to-19 year olds.

40% to 50% of young males who drowned had consumed alcohol prior to drowning.

40% to 50% of youths injured diving had consumed alcohol prior to diving.

Among high school seniors, twice as many frequent binge drinkers skipped school (55% versus 25%), and nearly five times as many seniors who binged frequently damaged school property (36% versus 8%); and

WHEREAS, In Senate Bill 808, signed by Governor William Donald Schaefer on May 27, 1993, the Maryland General Assembly specifically authorized Baltimore City to enact an ordinance restricting the placement of certain advertisements for alcoholic beverages in order to promote the welfare and temperance of minors; and

WHEREAS, An ordinance restricting the placement of advertisements for alcoholic beverages in publicly visible locations within Baltimore City is necessary for the promotion of the welfare and temperance of minors exposed to such advertisements; and

WHEREAS, The restrictions contained in the following ordinance will not unduly burden legitimate business activities or persons licensed by the State of Maryland to sell alcoholic beverages on a retail basis; and

WHEREAS, In order to protect legitimate business activities and to narrowly focus its efforts on those advertisements which most directly affect minors where they live, attend school, attend church and engage in recreational activities, the Baltimore City Council has determined to exercise less than the complete authority conferred on it by Senate Bill 808 (Chapter 637, 1993 Acts of the General Assembly) and has determined spe-

cifically not to restrict advertisements of alcoholic beverages in certain designated business and industrial zones hereinafter identified, with reasonable and appropriate setbacks from adjoining zones; now, therefore,

Section 1. BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF BALTIMORE, That Section(s) of the Baltimore City Code (1983 Replacement Volume, as Amended) be added, repealed, or amended, to read as follows:

ARTICLE 30 —ZONING

Chapter 10—Sign Regulations

10.0-1 General Requirements.

H. ALCOHOLIC BEVERAGE ADVERTISEMENTS. NO PERSON MAY PLACE ANY SIGN, POSTER, PLACARD, DEVICE, GRAPHIC DISPLAY, OR ANY OTHER FORM OF ADVERTISING THAT ADVERTISES ALCOHOLIC BEVERAGES IN PUBLICLY VISIBLE LOCATIONS. IN THIS SECTION "PUBLICLY VISIBLE LOCATIONS" INCLUDES OUTDOOR BILBOARDS, SIDES OF BUIDING, AND FREESTANDING SIGNBOARDS. THIS SECTION SHALL NOT APPLY TO:

1. THE PLACEMENT OF SIGNS, INCLUDING ADVERTISEMENTS: (I) INSIDE "LICENSED PREMISES" AS DEFINED IN ARTICLE 2B OF THE MARYLAND CODE; (II) ON COMMERCIAL VEHICLES USED FOR TRANSPORTING ALCOHOLIC BEVERAGES; OR (III) IN CONJUNCTION WITH A 1-DAY ALCOHOLIC BEVERAGES LICENSE OR A TEMPORARY LICENSE GRANTED BY THE BOARD OF LICENSE COMMISSIONERS;

2. ANY SIGN THAT CONTAINS THE NAME OR SLOGAN OF THE "LICENSED PREMISES" THAT HAS BEEN PLACED FOR THE PURPOSE OF IDENTIFYING THE "LICENSED PREMISES";

3. EXCEPT FOR BILLBOARDS AND FREESTANDING SIGNBOARDS, ANY SIGN FOR WHICH ZONING BOARD AP-

PROVAL OR A MINOR PRIVILEGE PERMIT IS REQUIRED;

4. ANY SIGN THAT CONTAINS A GENERIC DESCRIPTION OF BEER, WINE, LIQUOR, OR SPIRITS, OR ANY OTHER GENERIC DESCRIPTION OF ALCOHOLIC BEVERAGES;
5. ANY NEON OR ELECTRICALLY CHARGED SIGN ON "LICENSED PREMISES" THAT IS PROVIDED AS PART OF A PROMOTION OF A PARTICULAR BRAND OF ALCOHOLIC BEVERAGE;
6. ANY SIGN ON AN MTA VEHICLE OR A TAXICAB;
7. ANY SIGN ON PROPERTY OWNED, LEASED OR OPERATED BY THE MARYLAND STADIUM AUTHORITY;
8. ANY SIGN AT MEMORIAL STADIUM;
9. ANY SIGN AT A FACILITY THAT OPERATES IN ACCORDANCE WITH A LICENSE ISSUED UNDER § 11-304 OF THE BUSINESS REGULATION ARTICLE OF THE MARYLAND CODE;
10. ANY SIGN ON PROPERTY ADJACENT TO AN INTERSTATE HIGHWAY; OR
11. ANY SIGN LOCATED: (1) IN A B-4 ZONE, (II) IN A M-3 ZONE MORE THAN 1,000 FEET FROM THE BOUNDARY OF ANY OTHER ZONE WHICH IS NOT A B-4 OR M-3 ZONE, (III) IN A M-3 ZONE MORE THAN 500 FEET FROM THE BOUNDARY OF ANY OTHER ZONE WHICH IS NOT A B-4 OR M-3 ZONE PROVIDED SUCH SIGN

FACES AWAY FROM ANY SUCH OTHER ADJOINING ZONE.

Chapter 11—Administration and Enforcement

11.0-7 Penalties for violation.

Any person who violates, disobeys, omits, neglects, refuses to comply with, or resists the enforcement of any of the provisions of this ordinance shall be guilty of a misdemeanor and, upon conviction in any court of competent jurisdiction, shall be fined not less than 25 nor more than 500 dollars; ANY PERSON FOUND GUILTY OF VIOLATING A PROVISION OF SECTION 10.0-1h MAY BE FINED UP TO 1,000 DOLLARS. Every such person shall be deemed guilty of a separate offense for every day such violation shall continue after notification thereof.

SEC. 2. AND BE IT FURTHER ORDAINED, That this ordinance may only be applied to or interpreted to have an effect on any contract executed after the effective date of this ordinance and to any renewal term of a preexisting contract beginning after the effective date of this ordinance.

SEC. 3. AND BE IT FURTHER ENACTED, That this ordinance shall take effect on the 30th day after the date of its enactment.

APPENDIX G

Baltimore Ordinance No. 328 (City Council Bill 709):

AN ORDINANCE concerning

ZONING CODE—SIGNS

SECTION 1. BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF BALTIMORE, That Section(s) of the Baltimore City Code (1983 Replacement Volume, as amended) be added, repealed, or amended to read as follows:

ARTICLE 30—ZONING

Chapter 10—Sign Regulations.

10.0-3. Signs in Business and Industrial Districts.

a. General Provisions.

7. At least 50% of the window area of each side of a building shall be free of signage, when such window area is associated with commercial use.

b. The following types of signs, subject to the limitations prescribed for them, shall be permitted for uses authorized as principal or conditional uses in Business and Industrial Districts:

7. Special standards for business signs on store fronts.

The owner or operator of a business premises, other than a gasoline service station, shall designate to the Zoning Administrator consolidated area(s) on which all signs for the premises shall be located. The consolidated area(s) shall not exceed the square footage permitted for all signs, minus the total area used by any identification or name plate sign. Permit application shall be made on a one-time basis for each area, and shall include descriptions or drawings of the consolidated display area(s), or shall comply with specific criteria established by the Zon-

ing Administrator. Failure to maintain the consolidated areas in conformity with approved descriptions and/or drawings shall cause the permit to terminate.

Chapter 13—Rules and Definitions

13.0-2 Definitions.

74. Sign: any writing (including letter, word, or numeral), pictorial representation (including illustration or graphic), emblem (including symbol or trademark), flag (including banner or pennant), device, or any other figure of similar character which: (a) is a structure or any part thereof, or is attached to, painted on, or in any other manner represented on a building, window (this includes anything affixed to the interior and displayed in the space within twelve inches of the window), or other structure; and (b) is used to announce, direct attention, or advertise; and (c) is visible from outside a building. A sign shall not, however, include any writing, representation, or any figure of similar character within a building.

* * * *

APPENDIX H

Baltimore Ordinance No. 329 (City Council Bill 711):

AN ORDINANCE concerning

ZONING CODE—SIGNS

SECTION 1. BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF BALTIMORE, That Section(s) of the Baltimore City Code (1983 Replacement Volume, as amended) be added, repealed, or amended, to read as follows:

ARTICLE 30—ZONING

Chapter 10—Sign Regulations

10.0-3 Signs in Business and Industrial Districts

a. General provisions.

7. At least 50% for the window area of each side of a building shall be free of signage, when such window area is associated with commercial use.

b. The following types of signs, subject to the limitations prescribed for them, shall be permitted for uses authorized as principal or conditional uses in Business and Industrial Districts:

7. Special standards for business signs on store fronts.

The owner or operator of a business premises, other than a gasoline service station, shall designate to the Zoning Administrator consolidated areas on which all signs for the premises shall be located. The consolidated areas shall not exceed the square footage permitted for all signs, minus the total area used by any identification or name plate sign. Permit application shall be made on a one-time basis for each area, and shall include descriptions or drawings of the consolidated display area(s), or shall

comply with specific criteria established by the Zoning Administrator. Failure to maintain the consolidated areas in conformity with approved descriptions or drawings shall cause the permit to terminate.

8. Any sign on the side of a "licensed premises", as defined in Article 2B of the Annotated Code of Maryland, indicating the brand name and price of an alcoholic beverage product or a cigarette product available for sale within the "licensed premises" when permitted by any provision of this code or any other law or regulation now or hereafter in force.

SEC. 2. AND IT BE FURTHER ORDAINED, That this ordinance shall take effect on the 30th day after the date of its enactment.

APPENDIX I

[Filed Jan. 14, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. ———

ANHEUSER-BUSCH, INC.
One Busch Plaza
St. Louis, Missouri 63118-1852
Plaintiff,

v.

MAYOR AND CITY COUNCIL OF
BALTIMORE CITY
City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

Serve On:

NEIL M. JANEY
City Solicitor
City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

and

KURT L. SCHMOKE
in his official capacity as
Mayor of Baltimore City
City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

Serve On:

NEIL M. JANEY
City Solicitor
City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

and

THE CITY COUNCIL OF
BALTIMORE CITY
City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

Serve On:

NEIL M. JANEY
City Solicitor
City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

and

DAVID TANNER,
in his official capacity as
the General Superintendent of
Zoning Administration and
Enforcement,
417 E. Fayette Street
Baltimore, Maryland 21202

Serve On:

NEIL M. JANEY
City Solicitor
City Hall
100 N. Holliday Street
Baltimore, Maryland 21202

and

J. JOSEPH CURRAN, JR.,
in his official capacity as
Attorney General of the State
of Maryland

Serve On:

J. JOSEPH CURRAN, JR.,
Attorney General of the
State of Maryland
200 Saint Paul Place
Baltimore, Maryland 21202

and

WINFIELD M. KELLY, JR.
Secretary of State
State House
Annapolis, Maryland, 21401
Defendants.

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

Plaintiff Anheuser-Busch, Inc. ("Anheuser-Busch") for its Complaint herein alleges:

NATURE OF THE ACTION

1. This is an action:

(i) pursuant to 28 U.S.C. §§ 2201 and 2202, for a declaratory judgment that Section 222 of the Maryland Alcoholic Beverages Law (the "Maryland Statute") and Section 10.0-1h of the Baltimore Zoning Law (the "Baltimore Ordinance") are unconstitutional, void, unenforceable and of no force and effect under the First and Fourteenth Amendments of the

United States Constitution and Article 40 of the Declaration of Rights of the Maryland Constitution

(ii) pursuant to 42 U.S.C. § 1983, for a preliminary and permanent injunction enjoining enforcement of the Maryland Statute and the Baltimore Ordinance, or the taking of any action pursuant thereto, by defendants, their agents, servants, employees or anyone acting in concert with them or on their behalf; and

(iii) pursuant to 42 U.S.C. § 1988, for Anheuser-Busch's attorneys' fees for this action.

JURISDICTION AND VENUE

2. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332, and 1343. The amount in controversy, exclusive of interest and costs, exceeds $50,000.

3. Venue lies in this district pursuant to 28 U.S.C. § 1391(b), as the claims arose, and defendants reside, in this district.

THE PARTIES

4. Anheuser-Busch is a Missouri corporation, having its principal place of business in St. Louis, Missouri. Among other things, Anheuser-Busch is a manufacturer and distributor of alcoholic and non-alcoholic malt beverages.

5. Defendant Kurt L. Schmoke ("Schmoke") is the Mayor of the City of Baltimore ("Baltimore"). Defendant Schmoke is named herein in his official capacity as Mayor.

6. Defendant The City Council of Baltimore City (the "Council") is the elected body of legislators for the City of Baltimore.

7. Schmoke and the Council are purportedly authorized by the Maryland Statute to adopt the Baltimore

Ordinance. The Council passed the Baltimore Ordinance on December 9, 1993 and Schmoke signed it into law on January 6, 1994. With certain exceptions, the Baltimore Ordinance prohibits the advertisement of alcoholic beverages on publicly visible media, including but not limited to, outdoor billboards, sides of buildings and freestanding signboards in most of Baltimore.

8. Defendant David Tanner ("Tanner") is the General Superintendent of Zoning Administration and Enforcement of the City of Baltimore (the "Zoning Administrator") and is authorized and empowered to enforce the Baltimore Ordinance. Defendant Tanner is named herein in his official capacity as Zoning Administrator.

9. Defendant J. Joseph Curran, Jr. ("Curran") is the Attorney General of the State of Maryland (the "Attorney General") and is authorized and empowered to enforce the Maryland Statute. The Maryland Statute purports to enable the City of Baltimore to pass the Baltimore Ordinance. Defendant Curran is named herein in his official capacity as Attorney General.

BACKGROUND

A. *Outdoor Advertising by Anheuser-Busch*

10. Anheuser-Busch regularly sells and distributes several well-known brands of beer to wholesalers within the City of Baltimore. To promote the sale of its brands of beer in Baltimore, Anheuser-Busch advertises its products on television and radio, in print media, and through promotional events and displays. Anheuser-Busch also advertises its products on outdoor billboards and freestanding signboards and other publicly visible media (collectively, "outdoor advertising media"). On information and belief, local retailers also display promotional posters advertising Anheuser-Busch's brands on the sides of their buildings.

11. As a form of advertising, outdoor advertising has special characteristics in that it reaches a broad range of

consumers at a relatively low cost, and allows Anheuser-Busch to communicate with consumers in settings where other advertising media are unavailable. For these reasons, the use of outdoor advertising media is an essential part of Anheuser-Busch's marketing strategy to persuade consumers of beer to purchase the brands of beer manufactured and distributed by Anheuser-Busch.

12. Anheuser-Busch seeks to discourage illegal consumption of alcoholic beverages by minors. In connection with this effort, Anheuser-Busch adheres to the beer industry's self-imposed, voluntary advertising guidelines which are set forth in the Brewing Industry Advertising Code (the "Advertising Code"). The Advertising Code contains specific guidelines designed to ensure that beer advertisements do not target youth. Among other things, the Advertising Code provides that advertisers should not use images or entertainment figures that are intended to appeal primarily to persons under the legal drinking age. A copy of the Advertising Code is attached hereto as Exhibit A.

13. In addition, Anheuser-Busch has developed, and follows, a code that specifically covers its marketing efforts on college campuses (the "College Marketing Code"). The College Marketing Code promotes responsible drinking by those students who are twenty-one or over and choose to drink, and compliance with applicable state law by those students who are under twenty-one. A copy of the College Marketing Code is attached hereto as Exhibit B.

14. Further, Anheuser-Busch has developed or sponsored numerous programs in Baltimore and elsewhere that promote responsible drinking by adults who choose to drink, and discourage consumption of alcoholic beverages by those under the legal drinking age. For example, Anheuser-Busch has developed educational programs that seek to prevent underage drinking by focusing on the

primary factors that influence a minor's decision to drink, namely, parental and peer influence.

15. Prior to the passage of the Baltimore Ordinance, Anheuser-Busch had advertisements for its brands of beer displayed on dozens of billboards in Baltimore. On at least seven of those billboards, Anheuser-Busch devoted a portion of its advertising display space to public service messages designed, among other things, to promote responsible drinking among adults and to discourage underage drinking. Examples of Anheuser-Busch's public service messages are attached hereto as Exhibit C.

16. Prior to the enactment of the Baltimore Ordinance, each of Anheuser-Busch's contracts with the outdoor advertising companies that display Anheuser-Busch's advertisements contained a provision requiring that Anheuser-Busch's billboards comply with all zoning laws, ordinances or regulations of the City of Baltimore and the State of Maryland.

B. *The Maryland Statute*

17. For the past several years, certain Baltimore community groups have lobbied the city government for an ordinance to restrict the permissible location of outdoor advertising media for alcoholic beverages. The city government was unable to pass any such ordinance, however, because it lacked the authortiy to regulate alcoholic beverages, including the advertisements of alcoholic beverages. The proponents of the restrictions therefore sought the passage of legislation by the State of Maryland that would enable Baltimore to enact restrictions on the use of outdoor advertising media for alcoholic beverage advertisements.

18. On May 27, 1993, the Maryland legislature enacted the Maryland Statute. The Maryland Statute purports to delegate to the Mayor and City Council of Balti-

more the power to adopt an ordinance restricting advertisements of alcoholic beverages on outdoor advertising media in Baltimore. The sole purported purpose of the Maryland Statute, as expressed therein, is "the promotion of the welfare and temperance of minors." A copy of the Maryland Statute is annexed hereto as Exhibit D.

19. In relevant part, the Maryland Statute provides:

> (c)(1) The Mayor and City Council of Baltimore may adopt an ordinance restricting the placement of signs, posters, placards, devices, graphic displays, or any other forms of advertising or on the sides of the building of the licensed premises that advertise alcoholic beverages in publicly visible locations if:
>
> (i) The ordinance is necessary for the promotion of the welfare and temperance of minors exposed to advertisements for alcoholic beverages placed in publicly visible locations; and
>
> (ii) The restrictions do not unduly burden legitimate business activities of persons licensed under this article to sell alcoholic beverages on a retail basis.

20. The Maryland Statute defines "publicly visible locations" as including, but not limited to, advertising on billboards, sides of buildings and freestanding signboards.

21. The Maryland Statute mandates that any ordinance passed pursuant thereto exempt certain signs from regulations:

> (c)(2) The ordinance adopted by the Mayor and City Council of Baltimore City may not restrict:
>
> (i) the placement of signs, including advertisements:
>
> 1. Inside licensed premises;
>
> 2. On commercial vehicles used for transporting alcoholic beverages; or

3. In conjunction with a 1-day alcoholic beverages license or a temporary license granted by the board of license commissioners;

(ii) Any sign that contains the name or slogan of the licensed premises that has been placed for the purpose of identifying the licensed premises;

(iii) Except for billboards and freestanding signboards, any sign for which zoning board approval or a minor privilege permit is required;

(iv) Any sign that contains a generic description of beer, wine, liquor, or spirits, or any other generic description of alcoholic beverages;

(v) Any neon or electrically charged sign on licensed premises that is provided as part of a promotion of a particular brand of alcoholic beverage;

(vi) Any sign on an MTA vehicle or a taxicab;

(vii) Any sign on property owned, leased, or operated by the Maryland Stadium Authority;

(viii) Any sign at Memorial Stadium;

(ix) Any sign at a facility that operates in accordance with a license issued under § 11-304 of the business regulation article; or

(x) Any sign on property adjacent to an interstate highway.

22. In conjunction with the Maryland Statute, the legislature amended Article II of the Charter of the City of Baltimore, which contains the police power, to expand the power and authority of the Mayor and City Council of Baltimore City to include the following:

To pass any ordinance, not inconsistent with the provisions of this Charter or the laws of the State, which it may deem proper in the exercise of any of the powers, either express or implied, enumerated

in this Chapter, as well as any ordinance as it may deem proper in maintaining the peace, good government, health and welfare of Baltimore City *and to promote the welfare and temperance of minors exposed to advertisements for alcoholic beverages placed in publicly visible locations.* (New text [in italics].)

C. *The Baltimore Ordinance*

23. After the State passed the Maryland Statute, the Council passed the Baltimore Ordinance which, by amending the City Zoning Ordinance, bans, with certain exceptions, the advertisement of alcoholic beverages on outdoor advertising media in most parts of Baltimore. A copy of the Baltimore Ordinance is attached hereto as Exhibit E.

24. The Baltimore Ordinance contains a lengthy Preamble which sets forth purported legislative findings of the Council on the supposed effects that advertising for alcoholic beverages has on consumpton of alcoholic beverages by minors. In fact, there is no proof identified in the Preamble or elsewhere that advertising for alcoholic beverages, including Anheuser-Busch's outdoor advertising, increases or even affects consumption of alcoholic beverages by minors.

25. Among other things, the Baltimore Ordinance states:

> *Alcoholic beverage advertisements.* No person may place any sign, poster, placard, device, graphic display, or any other form of advertising that advertises alcoholic beverages in publicly visible locations. In this section "publicly visible locations" includes outdoor billboards, sides of buildings and freestanding signboards.

26. The Baltimore Ordinance specifically exempts from regulation all the categories of outdoor advertising

of alcoholic beverages that are mandatorily exempted by the Maryland Statute. The Baltimore Ordinance further exempts from regulation the placement of publicly visible alcoholic beverage advertising in certain designated business and industrial zones.

27. Pursuant to section 11.0-7 of the Baltimore Zoning Law, a violation of the Baltimore Ordinance is a misdemeanor punishable by a fine of up to $1,000 a day for every day the violation continues after notification of the violation.

28. Anheuser-Busch intends to continue its long-standing practice of advertising its brands of beer and displaying its public service messages on outdoor advertising media located in Baltimore. The placement of many of these outdoor advertisements will violate the prohibition of the Baltimore Ordinance.

29. On information and belief, if Anheuser-Busch does the acts described in the preceding paragraph, the Zoning Administrator will charge the persons who place the prohibited outdoor advertising with violations of the Baltimore Ordinance, subjecting them to criminal and civil enforcement proceedings and fines, unless the Maryland Statute and the Baltimore Ordinance are declared unconstitutional and enforcement of the Baltimore Ordinance is enjoined.

30. There is a case of actual controversy between plaintiff and defendants.

D. *Impact of the Maryland Statute and Baltimore Ordinance*

31. The Baltimore Ordinance, as authorized by the Maryland Statute, bans the accurate and non-misleading advertising of beer and other alcoholic beverages on outdoor advertising media in the City of Baltimore, and thereby deprives adult consumers in Baltimore of useful information about lawful products in the marketplace.

Anheuser-Busch's accurate and non-misleading advertising of its products, and related messages to the public such as those discouraging underage drinking and encouraging responsible drinking among adults, are speech protected by the First Amendment of the United States Constitution, and by Article 40 of the Declaration of Rights of the Maryland Constitution.

32. The sole declared purpose of both the Maryland Statute and the Baltimore Ordinance is the promotion of temperance among minors. That purpose, however, will not be directly and materially advanced by restricting minors' exposure to outdoor advertisements for alcoholic beverages.

33. The Maryland Statute and the Baltimore Ordinance will, in fact, undermine their stated purpose by prohibiting advertisers such as Anheuser-Busch from disseminating invaluable public service messages through outdoor advertising media that are expressly designed to discourage underage drinking.

34. The Maryland Statute and Baltimore Ordinance completely bar Anheuser-Busch's ability to address its commercial advertising for its brands of beer and its public service messages concerning, among other things, the responsible consumption of beer to adult consumers. At the same time, there are numerous other means of promoting temperance among minors that would impose no or far fewer restrictions on free speech than do the Maryland Statute and Baltimore Ordinance, such as educational programs and enforcement of existing laws that make it illegal for minors to possess or to be furnished with alcoholic beverages. Accordingly, the Maryland Statute and Baltimore Ordinance are not permissible means for achieving the express legislative goal of each.

FIRST CLAIM FOR RELIEF
(Declaratory Judgment)

35. Anheuser-Busch repeats, realleges and incorporates the allegations set forth in paragraphs 1 through 34 as though fully set forth herein.

36. The Maryland Statute purports to delegate to the Mayor and Council the express authority to pass an ordinance containing content-based restrictions on both the noncommercial and the commercial speech of Anheuser-Busch. The provisions of the Maryland Statute render it impossible for Baltimore to adopt an ordinance that comports with constitutional requirements under the First Amendment of the United States Constitution or under Article 40 of the Declaration of Rights of the Maryland Constitution.

37. The purported delegation of authority by the Maryland Statute provides for a direct restraint on Anheuser-Busch's exercise of free speech in advertising its brands of beer through outdoor advertising media, or in otherwise associating its brands of beer with public service messages on outdoor advertising media in the City of Baltimore.

38. The Maryland Statute's express delegation of authority to restrict lawful noncommercial and commercial speech violates Anheuser-Busch's right to freedom of speech guaranteed by the First Amendment to the United States Constitution, as made applicable to the States by the Fourteenth Amendment, and by Article 40 of the Declaration of Rights of the Maryland Constitution.

39. Similarly, the Baltimore Ordinance provides for a direct restraint on Anheuser-Busch's exercise of free speech in advertising its brands of beer through outdoor advertising media, or in otherwise associating its brands of beer with public service messages on outdoor advertising media in the City of Baltimore.

40. The Baltimore Ordinance's restriction of lawful expression violates Anheuser-Busch's right to freedom of speech guaranteed by the First Amendment to the United States Constitution, as made applicable to the States by the Fourteenth Amendment, and by Article 40 of the Declaration of Rights of the Maryland Constitution.

41. If the Maryland Statute and the Baltimore Ordinance are not declared unconstitutional, Anheuser-Busch will be caused irreparable injury for which there is no adequate remedy at law.

SECOND CLAIM FOR RELIEF
(Injunctive Relief)

42. Anheuser-Busch repeats, realleges and incorporates the allegations set forth in paragraphs 1 through 41 as though fully set forth herein.

43. Enforcement of the Baltimore Ordinance will cause plaintiff irreparable injury for which there is no adequate remedy at law.

44. Anheuser-Busch is entitled to a preliminary and permanent injunction enjoining enforcement of the Baltimore Ordinance, or the taking of any action pursuant thereto, by defendants.

THIRD CLAIM FOR RELIEF
(Attorneys' Fees)

45. Anheuser-Busch repeats, realleges and incorporates the allegations set forth in paragraphs 1 through 44 as though fully set forth herein.

46. Anheuser-Busch is entitled, pursuant to 42 U.S.C. § 1988, to recover reasonable attorneys' fees incurred by it in this action for vindication of its civil rights.

WHEREFORE, plaintiff Anheuser-Busch requests:

a) That this Court declare the Maryland Statute to be an impermissible restriction on speech, on its face or as

applied against plaintiff, in violation of the First Amendment of the United States Constitution, as made applicable to the States by the Fourteenth Amendment, and in violation of Article 40 of the Declaration of Rights of the Maryland Constitution, and thus void, unenforceable and of no force and effect; and

b) That this Court declare the Baltimore Ordinance to be an impermissible restriction on speech, on its face or as applied against plaintiff, in violation of the First Amendment of the United States Constitution, as made applicable to the States by the Fourteenth Amendment, and in violation of Article 40 of the Declaration of Rights of the Maryland Constitution, and thus void, unenforceable and of no force and effect; and

c) That this Court preliminarily and permanently enjoin defendants Mayor and City Council of Baltimore City, Kurt L. Schmoke, and his successors in the Office of Mayor, The City Council of the City of Baltimore, and David Tanner, and his successors in the Office of Zoning Administrator, from enforcing the Baltimore Ordinance, or the taking of any action pursuant thereto, by defendants, their agents, servants, employees or anyone acting in concert with them or on their behalf; and

d) That this Court award Anheuser-Busch reasonable attorneys' fees incurred herein in connection with plaintiff's vindication of its civil rights pursuant to 42 U.S.C. § 1988; and

e) That this Court order such further relief as it may deem just and proper, including the costs of this action.

Dated: Baltimore, Maryland
January 14, 1994

NEUBERGER, QUINN, GIELEN,
RUBIN & GIBBER, P.A.

By: /s/ Thomas M. Wood
THOMAS M. WOOD IV

Commerce Place
One South Street
Baltimore, Maryland 21202
(410) 332-8550

CADWALADER, WICKERSHAM
& TAFT

By: /s/ John J. Walsh
JOHN J. WALSH

100 Maiden Lane
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Attorneys for Plaintiff

APPENDIX J

[Filed Jan. 21, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. ———

PENN ADVERTISING OF BALTIMORE, INC.
3001 Remington Ave.
Baltimore, MD 21211

Plaintiff,

v.

THE MAYOR AND CITY COUNCIL
OF THE CITY OF BALTIMORE,
A Municipal Corporation
City Hall
100 N. Holliday Street
Baltimore, MD 21202

Serve On:

NEAL M. JANEY
City Solicitor
100 City Hall
Baltimore, MD 21202

and

J. JOSEPH CURRAN, JR.
Attorney General of the State
of Maryland, in his official capacity

Serve On:

J. JOSEPH CURRAN, JR.
Attorney General of the
State of Maryland
200 Saint Paul Place
Baltimore, MD 21202

and

TYRAS S. ATHEY
Secretary of State for the
State of Maryland
State House
Annapolis, MD 21401

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiff, Penn Advertising of Baltimore, Inc. ("Penn Advertising"), sues the Defendants, the Mayor and City Council of the City of Baltimore, Maryland (the "City") and J. Joseph Curran, Jr. ("Curran"), in his official capacity, stating as follows:

GENERAL ALLEGATIONS

1. Jurisdiction is conferred on this Court by 28 U.S.C. § 1331 and §§ 1343(a)(3) and (4).

2. This Complaint is authorized by 42 U.S.C. § 1983.

3. This Court has supplemental jurisdiction over claims brought under State and local law pursuant to 28 U.S.C. § 1367.

4. This Court has jurisdiction to enter a declaratory judgment and injunctive relief under 28 U.S.C. §§ 2201 and 2202.

5. Attorneys' fees are provided for by 42 U.S.C. § 1988.

6. All events and actions, unless otherwise set forth, took place or will take place within the District of Maryland. Therefore, venue lies in this District pursuant to 28 U.S.C. § 1391(b).

7. Plaintiff, Penn Advertising, is a Delaware corporation authorized to do business in Maryland and is doing business in the City of Baltimore and elsewhere in the State of Maryland with its principal place of business at 3001 Remington Avenue, Baltimore, Maryland 21211.

8. Defendant, City, is a municipal corporation duly organized and existing under the laws of the State of Maryland and is a political subdivision of the State of Maryland.

9. Defendant, J. Joseph Curran, Jr., is the Attorney General of the State of Maryland with the official duty to enforce and defend from constitutional attack, the laws of the State of Maryland. Curran is named herein as a defendant in his official capacity.

10. Penn Advertising is engaged in the business of outdoor advertising in the City of Baltimore and elsewhere in the State of Maryland. Penn Advertising leases land from private property owners, on which land Penn Advertising erects and maintains outdoor advertising sign structures as a medium for communication, and disseminates, and makes its signs available to the public to disseminate, commercial and noncommercial messages on those outdoor advertising sign structures. Among the advertising messages Penn Advertising has disseminated in the past, currently disseminates, and intends to disseminate in the future, are advertising messages concerning alcoholic beverages. All of said advertising messages for particular products concern products that are lawful in the City and State of Maryland. All of said advertising messages are neither deceptive nor misleading.

11. On or about May 27, 1993, Senate Bill 808 ("SB 808") was enacted by the Maryland General Assembly and went into effect on June 1, 1993. A true and correct copy of SB 808 is attached hereto and is made a part hereof as Exhibit A and is incorporated herein by reference.

12. A portion of Section 1 of SB 808 is codified at Art. 2B, § 222 of the Maryland Code Annotated ("Section 222"). Section 222(a) limits the application of Section 222 solely to Baltimore City. Section 222(b) defines "publicly visible locations" as follows: "In this section 'publicly visible locations' include outdoor billboards, sides of buildings, and freestanding signboards." Section 222(c) purports to give the City the authority to adopt an ordinance:

> . . . restricting the placement of signs, posters, placards, devices, graphic displays, or any other forms of advertising or on the sides of the building of the licensed premises that advertise alcoholic beverages in publicly visible locations; if
>
> (i) The ordinance is necessary for the promotion of the welfare and temperance of minors exposed to advertisements for alcoholic beverages placed in publicly visible locations; and
>
> (ii) The restrictions do not unduly burden legitimate business activities of persons licensed under this article to sell alcoholic beverages on a retail basis.

13. Section 222(c)(2) further provides that any ordinance enacted by the City must not restrict certain exempt categories of signs and certain exempt categories of messages pertaining to alcoholic beverages:

> (2) The ordinance adopted by the Mayor and City Council of Baltimore City may not restrict:

(i) The placement of signs, including advertisements:

1. Inside licensed premises;
2. On commercial vehicles used for transporting alcoholic beverages; or
3. In conjunction with a 1-day alcoholic beverages license or a temporary license granted by the Board of Liquor Commissioners;

(ii) Any sign that contains the name or slogan of the licensed premises that has been placed for the purpose of identifying the licensed premises;

(iii) Except for billboards and freestanding signboards, any sign for which zoning board approval or a minor privilege permit is required;

(iv) Any sign that contains a generic description of beer, wine, liquor, or spirits, or any other generic description of alcoholic beverages;

(v) Any neon or electrically charged sign on licensed premises that is provided as part of a promotion for a particular brand of alcoholic beverage;

(vi) Any sign on an MTA vehicle or a taxicab;

(vii) Any sign on property owned, leased, or operated by the Maryland Stadium Authority;

(viii) Any sign at Memorial Stadium;

(ix) Any sign at a facility that operates in accordance with a license issued under § 11-304 of the Business Regulation Article; or

(x) Any sign on property adjacent to an interstate highway.

14. Section 222(d) states that: "A person who violates the provisions of this section is guilty of a misdemeanor and may be fined no more than $1,000."

15. A portion of Section 1 of SB 808 also amended Article II of the Charter of Baltimore City and reads as follows:

Article II—General Powers

The Mayor and City Council of Baltimore shall have full power and authority to exercise all of the powers heretofore or hereafter granted to it by the Constitution of Maryland or by any Public General or Public Local Laws of the State of Maryland; and in particular without limitation upon the foregoing, shall have power by ordinance, or such other method as may be provided for in its Charter, subject to the provisions of said Constitution and Public General Laws:

(47) General Welfare.

To pass any ordinance, not inconsistent with the provisions of this Charter or the laws of the State, which it may deem proper in the exercise of any of the powers, either express or implied, enumerated in this Charter, as well as any ordinance as it may deem proper in maintaining the peace, good government, health and welfare of Baltimore City AND TO PROMOTE THE WELFARE AND TEMPERANCE OF MINORS EXPOSED TO ADVERTISEMENTS FOR ALCOHOLIC BEVERAGES PLACED IN PUBLICLY VISIBLE LOCATIONS.

16. On or about January 6, 1994, the City enacted Bill No. 626 ("Bill No. 626"), which is codified at Article 30, Section 10.0-1H and Article 30, Section 11.0-7 of the Baltimore City Code. A true and correct copy of Bill No. 626 is attached hereto as Exhibit B and is incorporated herein by reference.

17. The Preamble of Bill No. 626 sets forth in detail in eleven "Whereas" clauses the asserted facts that the Mayor and City Council of Baltimore relied upon as the basis for enacting Bill No. 626 into law.

18. The Preamble of Bill No. 626 made a number of legislative findings, including without limitation, that:

> WHEREAS, In Senate Bill 808, signed by Governor William Donald Schaefer on May 27, 1993, the Maryland General Assembly specifically authorized Baltimore City to enact an ordinance restricting the placement of certain advertisements for alcoholic beverages in order to promote the welfare and temperance of minors; and
>
> WHEREAS, An ordinance restricting the placement of advertisements for alcoholic beverages in publicly visible locations within Baltimore City is necessary for the promotion of the welfare and temperance of minors exposed to such advertisements; and
>
> WHEREAS, The restrictions contained in the following ordinance will not unduly burden legitimate business activities of persons licensed by the State of Maryland to sell alcoholic beverages on a retail basis; . . .

19. Section 1 of Bill No. 626 amended the Baltimore City Code (1983 replacement volume, as amended) to add Section 10.0-1H to Article 30, Zoning, Chapter 10, Sign Regulations to read as follows:

> ARTICLE 30—ZONING
>
> CHAPTER 10—Sign Regulations
>
> 10.0-1 General Requirements.
>
> H. ALCOHOLIC BEVERAGE ADVERTISEMENTS. NO PERSON MAY PLACE ANY

SIGN, POSTER, PLACARD, DEVICE, GRAPHIC DISPLAY, OR ANY OTHER FORM OF ADVERTISING THAT ADVERTISES ALCOHOLIC BEVERAGES IN PUBLICLY VISIBLE LOCATIONS. IN THIS SECTION "PUBLICLY VISIBLE LOCATIONS" INCLUDES OUTDOOR BILLBOARDS, SIDES OF BUILDING, AND FREESTANDING SIGNBOARDS. THIS SECTION SHALL NOT APPLY TO:

1. THE PLACEMENT OF SIGNS, INCLUDING ADVERTISEMENTS: (I) INSIDE "LICENSED PREMISES" AS DEFINED IN ARTICLE 2B OF THE MARYLAND CODE; (II) ON COMMERCIAL VEHICLES USED FOR TRANSPORTING ALCOHOLIC BEVERAGES; OR (III) IN CONJUNCTION WITH A 1-DAY ALCOHOLIC BEVERAGES LICENSE OR A TEMPORARY LICENSE GRANTED BY THE BOARD OF LICENSE COMMISSIONERS;

2. ANY SIGN THAT CONTAINS THE NAME OR SLOGAN OF THE "LICENSED PREMISES" THAT HAS BEEN PLACED FOR THE PURPOSE OF IDENTIFYING THE "LICENSED PREMISES";

3. EXCEPT FOR BILLBOARDS AND FREESTANDING SIGNBOARDS, ANY SIGN FOR WHICH ZONING BOARD APPROVAL OR A MINOR PRIVILEGE PERMIT IS REQUIRED;

4. ANY SIGN THAT CONTAINS A GENERIC DESCRIPTION OF BEER, WINE,

LIQUOR, OR SPIRITS, OR ANY OTHER GENERIC DESCRIPTION OF ALCOHOLIC BEVERAGES;

5. ANY NEON OR ELECTRICALLY CHARGED SIGN ON "LICENSED PREMISES" THAT IS PROVIDED AS PART OF A PROMOTION OF A PARTICULAR BRAND OF ALCOHOLIC BEVERAGE;
6. ANY SIGN ON AN MTA VEHICLE OR A TAXICAB;
7. ANY SIGN ON PROPERTY OWNED, LEASED OR OPERATED BY THE MARYLAND STADIUM AUTHORITY;
8. ANY SIGN AT MEMORIAL STADIUM;
9. ANY SIGN AT A FACILITY THAT OPERATES IN ACCORDANCE WITH A LICENSE ISSUED UNDER § 11-304 OF THE BUSINESS REGULATION ARTICLE OF THE MARYLAND CODE;
10. ANY SIGN ON PROPERTY ADJACENT TO AN INTERSTATE HIGHWAY; OR
11. ANY SIGN LOCATED: (I) IN A B-4 ZONE, (II) IN A M-3 ZONE MORE THAN 1,000 FEET FROM THE BOUNDARY OF ANY OTHER ZONE WHICH IS NOT A B-4 OR M-3 ZONE, (III) IN A M-3 ZONE MORE THAN 500 FEET FROM THE BOUNDARY OF ANY OTHER ZONE WHICH IS NOT A B-4 OR M-3 ZONE PROVIDED SUCH SIGN FACES AWAY FROM SUCH OTHER ADJOINING ZONE.

20. Section 1 of Bill No. 626 also amended the Baltimore City Code (1983 replacement volume, as amended) to add Section 11.0-7 to Article 30, Zoning, Chapter 11, Administration and Enforcement, to read as follows:

Chapter 11—Administration and Enforcement

11.0-7 Penalties for violation.

Any person who violates, disobeys, omits, neglects, refuses to comply with, or resists the enforcement of any of the provisions of this ordinance shall be guilty of a misdemeanor and, upon conviction in any court of competent jurisdiction, shall be fined not less than 25 nor more than 500 dollars; ANY PERSON FOUND GUILTY OF VIOLATING A PROVISION OF SECTION 10.0-1h MAY BE FINED UP TO 1,000 DOLLARS. Every such person shall be deemed guilty of a separate offense for every day such violation shall continue after notification thereof.

21. Section 2 of Bill No. 626 states that:

AND BE IT FURTHER ORDAINED, That this ordinance may only be applied to or interpreted to have an effect on any contract executed after the effective date of this ordinance and to any renewal term of a preexisting contract beginning after the effective date of this ordinance.

22. Section 3 of Bill No. 626 states that:

AND BE IT FURTHER ENACTED, That this ordinance shall take effect on the 30th day after the date of its enactment.

23. The Mayor of the City signed Bill No. 626 on January 6, 1994, which is deemed the date of the enactment of Bill No. 626.

24. On information and belief, the City intends to enforce the aforesaid provisions of Bill No. 626.

25. Penn Advertising will be required to remove advertisements disseminating messages concerning alcoholic beverages from its billboards that are subject to the prohibitions of Bill 626 on or before February 5, 1994. Penn Advertising also will be prohibited from disseminating messages concerning alcoholic beverages on billboards subject to the prohibitions of Bill No. 626 after February 5, 1994.

26. The enactment of Bill No. 626 and the enforcement by the City of Bill No. 626 have caused and will cause Penn Advertising irreparable harm, in that Penn Advertising will be required to remove advertisements disseminating messages concerning alcoholic beverages from its billboards and to cease placing such advertisements on its billboards subject to the prohibitions of Bill No. 626 in the future, thereby depriving Penn Advertising of its constitutional right to engage in speech protected by the First Amendment of the Constitution of the United States and Article 40 of the Declaration of Rights of the Maryland Constitution.

27. Penn Advertising is in doubt as to its rights and the duties and obligations imposed by the provisions of SB 808 and Bill No. 626, and is in fear of the imposition of civil and criminal penalties by the City of Baltimore in the event that it attempts to exercise its constitutional right to engage in protected speech.

28. There is a bona fide, actual, justiciable controversy existing between the parties hereto.

29. As more specifically alleged below, Penn Advertising has no adequate remedy at law, and there is an actual, practical and present need for declaratory and injunctive relief because, unless enjoined, the City's actions will result in loss of Penn Advertising's substantial rights.

30. All conditions precedent to the relief demanded herein have either been performed or have occurred.

COUNT I

(FIRST AMENDMENT—VOID FOR VAGUENESS)

31. Plaintiff realleges the allegations in paragraphs 1 through 30 as though fully set forth herein.

32. Article 30, Section 10.0-1H the Baltimore City Code fails to define the messages that constitute prohibited alcoholic beverage advertising with sufficient specificity to allow a person wishing to disseminate messages regarding alcoholic beverages to know whether such speech in "publicly visible locations" would constitute a criminal act.

33. Accordingly, the provisions of Article 30, Section 10.0-1H constitute an unconstitutionally vague restraint upon protected speech in violation of the First and Fourteenth Amendments of the United States Constitution and Article 40 of the Declaration of Rights of the Maryland Constitution and are therefore invalid.

COUNT II

(FIRST AMENDMENT—VOID FOR VAGUENESS)

34. Plaintiff realleges the allegations in paragraphs 1 through 30 as though fully set forth herein.

35. Section 222, which purportedly authorizes the City to enact prohibitions on alcoholic beverage advertising fails to define the messages that the City purportedly is permitted to prohibit with sufficient specificity to allow a person wishing to disseminate messages regarding alcoholic beverages to know whether such speech in "publicly visible locations" would constitute a criminal act.

36. Accordingly, the provisions of Section 222 constitute an unconstitutionally vague restraint upon pro-

tected speech in violation of the First and Fourteenth Amendments of the United States Constitution and Article 40 of the Declaration of Rights of the Maryland Constitution and are therefore invalid.

COUNT III

(FIRST AMENDMENT—OVERBROAD CONTENT-BASED RESTRAINT OF PROTECTED SPEECH)

37. Plaintiff realleges the allegations in paragraphs 1 through 30 as though fully set forth herein.

38. The dissemination of messages regarding alcoholic beverages in "publicly visible locations" is constitutionally protected expressive activity.

39. Article 30, Section 10.0-1H of the Baltimore City Code makes it a criminal act to disseminate alcoholic beverage advertising in "publicly visible locations" solely on the basis of its content.

40. Accordingly, the provisions of Article 30, Section 10.0-1H of the Baltimore City Code constitute an invalid content-based prohibition that restricts constitutionally protected speech in violation of the First and Fourteenth Amendments of the United States Constitution and Article 40 of the Declaration of Rights of the Maryland Constitution and are therefore invalid.

COUNT IV

(FIRST AMENDMENT—OVERBROAD CONTENT-BASED RESTRAINT OF PROTECTED SPEECH)

41. Plaintiff realleges the allegations in paragraphs 1 through 30 as though fully set forth herein.

42. The dissemination of messages regarding alcoholic beverages in "publicly visible locations" is constitutionally protected expressive activity.

43. Section 222, which purportedly authorizes the City to enact prohibitions that make it a criminal act to disseminate alcoholic beverage advertising in "publicly visible locations" solely on the basis of its content.

44. Accordingly, the provisions of Section 222 constitute an invalid content-based prohibition that restricts constitutionally protected speech in violation of the First and Fourteenth Amendments of the United States Constitution and Article 40 of the Declaration of Rights of the Maryland Constitution and are therefore invalid.

COUNT V

(FIRST AMENDMENT—STANDARDLESS DELEGATION OF ADMINISTRATIVE DISCRETION)

45. Plaintiff realleges the allegations in paragraphs 1 through 30 as though fully set forth herein.

46. Article 30, Section 10.0-1H of the Baltimore City Code fails to clearly specify precise standards that would enable the police and other officials of the City of Baltimore to determine from the provisions of this law the content of those messages that would be criminal acts when disseminated in "publicly visible locations."

47. Accordingly, the provisions of Article 30, Section 10.0-1H of the Baltimore City Code constitute an invalid standardless delegation of unrestricted administrative discretion in violation of the First and Fourteenth Amendments to the United States Constitution and Article 40 of the Declaration of Rights of the Maryland Constitution and are therefore invalid.

COUNT VI

(FIRST AMENDMENT—STANDARDLESS DELEGATION OF ADMINISTRATIVE DISCRETION)

48. Plaintiff realleges the allegations in paragraphs 1 through 30 as though fully set forth herein.

49. Section 222, which purportedly authorizes the City to enact prohibitions on alcoholic beverage advertising, fails to clearly specify the precise standards that would enable the City to determine from the provisions of this law the content of those messages that would be prohibited from dissemination in "publicly visible locations."

50. Accordingly, the provisions of Section 222 constitute an invalid standardless delegation of unrestricted administrative discretion in violation of the First and Fourteenth Amendments to the United States Constitution and Article 40 of the Declaration of Rights of the Maryland Constitution and are therefore invalid.

COUNT VII

(FIRST AMENDMENT—INVALID CONTENT-BASED REGULATION FAVORING CERTAIN NONCOMMERCIAL SPEECH OVER OTHER NONCOMMERCIAL SPEECH)

51. Plaintiff realleges the allegations in paragrahps 1 through 30 as though fully set forth herein.

52. Article 30, Section 10.0-H of the Baltimore City Code exempts from its prohibitions certain categories of alcoholic beverage advertising that may include certain noncommercial messages.

53. Although Article 30, Section 10.0-1H of the Baltimore City Code creates certain exempt categories of

alcoholic beverage advertising that may include noncommercial messages, the section makes it a criminal offense to disseminate other noncommercial messages at "publicly visible locations" that do not fall within these exempt categories of speech.

54. Accordingly, the provisions of Article 30, Section 10.0-1H constitute an invalid content-based restraint on protected noncommercial speech in violation of the First and Fourteenth Amendments to the Constitution of the United States and Article 40 of the Declaration of Rights of the Maryland Constitution and are therefore invalid.

COUNT VIII

(FIRST AMENDMENT—INVALID CONTENT BASED REGULATION FAVORING CERTAIN NONCOMMERCIAL SPEECH OVER OTHER NONCOMMERCIAL SPEECH)

55. Plaintiff realleges the allegations in paragraph 1 through 30 as though fully set forth herein.

56. Section 222, which purportedly authorizes the City to enact prohibitions on alcoholic beverage advertising, requires the City to exempt certain categories of commercial alcoholic beverage advertising that may include certain noncommercial messages from its prohibitions.

57. Although Section 222 requires that the City must exempt from any prohibition of alcoholic beverage advertising certain categories of such advertising that may include noncommercial messages, Section 222 purportedly authorizes the City to make it a criminal offense to disseminate other noncommercial messages at "publicly visible locations" that do not fall within these exempt categories of speech.

58. Accordingly, the provisions of Section 222 constitute an invalid content-based restraint on protected noncommercial speech in violation of the First and Fourteenth Amendments of the United States Constitution

and Article 40 of the Declaration of Rights of the Maryland Constitution and are therefore invalid.

COUNT IX

(FIRST AMENDMENT—INVALID CONTENT-BASED REGULATION FAVORING CERTAIN COMMERCIAL SPEECH OVER OTHER NONCOMMERCIAL SPEECH)

59. Plaintiff realleges the allegations in paragraphs 1 through 30 as though fully set forth herein.

60. Article 30, Section 10.0-1H of the Baltimore City Code exempts from its prohibitions certain categories of alcoholic beverage advertising that may include commercial messages.

61. Although Article 30, Section 10.0-1H of the Baltimore City Code exempts from its prohibitions certain categories of alcoholic beverage advertising that may include commercial messages, the section makes it a criminal offense to disseminate other noncommercial messages at "publicly visible locations" that do not fall within these exempt categories of speech.

62. Accordingly, the provisions of Article 30, Section 10.0-1H constitute an invalid content-based restraint on protected noncommercial speech in violation of the First and Fourteenth Amendments to the Constitution of the United States and Article 40 of the Declaration of Rights of the Maryland Constitution and are therefore invalid.

COUNT X

(FIRST AMENDMENT—INVALID CONTENT-BASED REGULATION FAVORING CERTAIN COMMERCIAL SPEECH OVER OTHER NONCOMMERCIAL SPEECH)

63. Plaintiff realleges the allegations in paragraphs 1 through 30 as though fully set forth herein.

64. Section 222, which purportedly authorizes the City to enact prohibitions on alcoholic advertising, requires the City to exempt from these prohibitions certain categories of alcoholic beverage advertising that may include certain commercial messages.

65. Although Section 222 requires that the City must exempt from its prohibitions of alcoholic beverage advertising certain categories of such advertising that may include commercial messages, Section 222 purportedly authorizes the City to make it a criminal offense to disseminate other noncommercial messages at "publicly visible locations" that do not fall within these exempt categories of speech.

66. Accordingly, the provisions of Section 222 constitute an invalid content-based restraint on protected noncommercial speech in violation of the First and Fourteenth Amendments of the United States Constitution and Article 40 of the Declaration of Rights of the Maryland Constitution and are therefore invalid.

COUNT XI

(FIRST AMENDMENT—REGULATION OF COMMERCIAL SPEECH THAT DOES NOT ADVANCE ASSERTED GOVERNMENTAL INTEREST)

67. Plaintiff realleges the allegations in paragraphs 1 through 30 as though fully set forth herein.

68. The governmental interest purportedly advanced by the implementation of the provisions of Article 30, Section 10.0-1H is recited in the Preamble to Bill No. 626 as ". . . the promotion of the welfare and temperance of minors exposed to such advertisements."

69. Accordingly, to the extent that the provisions of Article 30, Section 10.0-1H are intended to restrict the commercial advertising of alcoholic beverages, those pro-

visions fail to directly advance to a material degree the purported governmental interest and therefore constitute an invalid restriction on protected commercial speech in violation of the First and Fourteenth Amendments to the United States Constitution and Article 40 of the Declaration of Rights of the Maryland Constitution and are therefore invalid.

COUNT XII

(FIRST AMENDMENT—REGULATION OF COMMERCIAL SPEECH THAT DOES NOT ADVANCE ASSERTED GOVERNMENTAL INTEREST)

70. Plaintiff realleges the allegations in paragraphs 1 through 30 as though fully set forth herein.

71. The governmental interest purportedly advanced by the implementation of the provisions of SB 808 is ". . . [t]he promotion of the welfare and temperance of minors."

72. Accordingly, to the extent that SB 808 is intended to authorize the City to restrict the commercial advertising of alcoholic beverages, the provisions of SB 808 fail to directly advance the governmental interest asserted in SB 808 and therefore constitute an invalid restriction of protected commercial speech in violation of the First and Fourteenth Amendments the United States Constitution and Article 40 of the Declaration of Rights of the Maryland Constitution and are therefore invalid.

COUNT XIII

(FIRST AMENDMENT—REGULATION OF COMMERCIAL SPEECH MORE EXTENSIVE THAN NECESSARY TO ACHIEVE ASSERTED GOVERNMENTAL INTEREST.)

73. Plaintiff realleges that allegations in paragraphs 1 through 30 and 68 as though fully set forth herein.

74. The provisions of Article 30, Section 10.0-1H of the Baltimore City Code are more extensive than necessary to serve the purported governmental interest and therefore constitute an invalid restriction on protected commercial speech is [sic] in violation of the First and Fourteenth Amendments to the United States Constitution and Article 40 of the Declaration of Rights of the Maryland Constitution and are therefore invalid.

COUNT XIV

(FIRST AMENDMENT—REGULATION OF COMMERCIAL SPEECH MORE EXTENSIVE THAN NECESSARY TO ACHIEVE ASSERTED GOVERNMENTAL INTEREST.)

75. Plaintiff realleges that allegations in paragraphs 1 through 30 and 71 as though fully set forth herein.

76. The provisions of SB 808 are more extensive than necessary to serve the purported governmental interest and therefore constitute an invalid restriction of protected commercial speech in violation of the First and Fourteenth Amendments to the United States Constitution and Article 40 of the Declaration of Rights of the Maryland Constitution.

77. Accordingly, the City of Baltimore lacked the authority under SB 808 to enact Article 30, Section 10.0-1H of the Baltimore City Code, which is therefore void and unenforceable.

COUNT XV

(MARYLAND CODE—EXCEEDING CITY'S DELEGATED AUTHORITY TO LEGISLATE)

78. Plaintiff realleges the allegations in paragraphs 1 through 30 as though fully set forth herein.

79. SB 808 prohibits the City of Baltimore from adopting any restriction on the dissemination of alcoholic

beverage advertising in "publicly visible locations" unless ". . . the ordinance is necessary for the promotion of the welfare and temperance of minors exposed to advertisements for alcoholic beverages placed in publicly visible locations. . . ."

80. The Preamble to Bill No. 626 sets forth the purported facts relied upon by the City Council of Baltimore for its determination that Article 30, Section 10.0-1H of the Baltimore City Code is necessary to promote the welfare and temperance of minors.

81. The asserted facts relied upon by the City Council of Baltimore do not support a determination that the prohibition of alcoholic beverage advertising in "publicly visible locations" in the City of Baltimore as set forth in Section 10.0-1H is necessary to promote the welfare and temperance of minors.

82. Accordingly, the City of Baltimore lacked the authority under SC 808 to enact Article 30, Section 10.0-1H of the Baltimore City Code, which is therefore void and unenforceable.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Penn Advertising prays:

A. That this Court enter a declaratory judgment, holding that the aforesaid SB 808 is unconstitutional, on its face or as applied to the Plaintiff, is null and void and of no legal effect, and is a legal nullity;

B. That this Court enter a declaratory judgment holding that the aforesaid Bill No. 626 is unconstitutional, null and void, and of no legal effect.

C. That this Court enter a declaratory judgment, holding that the aforesaid Bill No. 626 is null and void and of no legal effect and is a legal nullity because in enacting Bill No. 626, the Mayor and City Council exceeded

the authority granted to them by SB 808 to enact legislation restricting alcoholic beverage advertising;

D. That this Court issue a preliminary injunction ordering the City, its officers, representatives, agents, employees, attorneys, persons acting in concert with the City and all other persons to refrain from enforcing the provisions of Bill No. 626 pending a final disposition of the merits of the underlying controversy.

E. That this Court enter an order permanently enjoining the City and all other persons from enforcing the provisions of the aforesaid Bill No. 626;

F. That this Court award Plaintiff Penn Advertising's costs, attorneys' fees, damages and such other and further relief as may be just in the premises.

Respectfully submitted

RUBIN, WINSTON, DIERCKS, HARRIS & COOKE

/s/ Jeffrey Harris
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Dated January 21, 1994

APPENDIX K

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. HAR 94-117

ANHEUSER-BUSCH, INC.,
Plaintiff,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY, *et al.*,
Defendants.

AFFIDAVIT OF JOHN E. CALFEE
IN SUPPORT OF PLAINTIFF'S MOTION
FOR A PRELIMINARY INJUNCTION

STATE OF MARYLAND)
) ss.:
COUNTY OF MONTGOMERY)

JOHN E. CALFEE, being duly sworn, deposes and says:

1. I am a Visiting Fellow at the Brookings Institution and am an adjunct scholar at the American Enterprise Institute. The views presented here are my own, not those of the Brookings Institution. I submit this affidavit in support of the motion of plaintiff Anheuser-Busch, Inc. ("Anheuser-Busch") for a preliminary injunction against enforcement of Section 10.0-1h of the Baltimore Zoning Law (the "Ordinance"), which outlaws most out-

door advertising for alcoholic beverages in Baltimore in an attempt to promote temperance among minors.

2. I received a Ph.D. in economics from the University of California at Berkeley in 1980. From 1980 through 1986, I served in the Bureau of Economics at the Federal Trade Commission ("FTC"). During my tenure at the FTC, I worked on advertising regulation and other consumer protection matters. After leaving the FTC and continuing until this past June, I taught marketing and consumer behavior courses at the University of Maryland and Boston University, and conducted research on the effects of advertising. It is my expert opinion that advertising has no discernible effect on market-wide consumption of alcoholic beverages, including consumption by minors.

3. I have written extensively for academic journals in the area of advertising regulation. Most recently, in 1993 I completed a report on the effects of alcoholic beverage advertising entitled "The Influence of Advertising on Alcohol Consumption: An Economic Analysis of Selected European Nations." This report (in which I was assisted by Carl Scheraga) will soon be published in the *International Journal of Advertising*. My 1993 report is attached hereto as Exhibit 1. A complete list of articles I have published is included as part of my curriculum vitae which is attached hereto as Exhibit 2.

4. The stated goal of the Ordinance is to promote the welfare and temperance of minors. As made plain in the Preamble, the Ordinance rests on the assumption that a ban on outdoor advertisements of alcoholic beverages will reduce consumption of alcoholic beverages by persons under the age of twenty-one. That assumption is contrary to the prevailing scholarly understanding of the effects of advertising and the great weight of scientific evidence.

5. In essence, the Ordinance reflects an incorrect view of the effects of advertising. In my opinion, it is very

unlikely that advertising will increase total sales in a mature market. A mature market is a market for an established product, such as beer, rather than a new product. In a mature market, the dominant effect of advertising is to capture market share from competitors, not to increase overall consumption of the advertised product.

Leading Reviews of the Scholarly Literature

6. There is a large body of scholarly research that specifically considers the effects of alcoholic beverage advertising on consumption. Although this research employs a wide variety of techniques, it consistently finds that advertising has no detectable influence on overall levels of consumption. I will briefly describe the leading studies, and attach copies of them in the event the Court wishes to examine them in greater detail.

7. The most comprehensive and authoritative report on the effects of alcoholic beverage advertising on consumption was published by the FTC in 1985. In that report, the FTC staff reviewed all of the existing research literature on the effects of alcoholic beverage advertising. Based on this review, the FTC report concluded at page 2 that there was "no reliable basis to conclude that alcohol advertising significantly affects consumption." A copy of the FTC study is attached hereto as Exhibit 3.

8. In 1988, Reginal G. Smart, a prominent scholar at the government-funded Addiction Research Center in Ontario, Canada, reviewed the same body of literature, as well as studies published subsequently to the FTC report, in an article entitled "Does Alcohol Advertising Affect Overall Consumption? A Review of Empirical Studies." Dr. Smart similarly states in the abstract (page 316) for his review his conclusion that "total advertising expenditures have no reliable correlation with sales of alcohol beverages," and "in general the evidence indicates

little impact of alcohol advertising on alcohol sales or drinking." A copy of Dr. Smart's study is attached hereto as Exhibit 4.

9. Another recent and very thorough review of the literature on alcoholic beverage advertising was conducted by Joseph Fisher in his 1993 book, *Advertising, Alcohol Consumption, and Abuse: A Worldwide Survey*. He concluded at page 142 that "no experimental evidence exists" that advertising affects consumption, that "quasi-experiments" (by which he means consumer surveys) suggest no more than that advertising may account for less than 4% of the variation in consumption of alcoholic beverages, that "Econometric studies find no effect [on total consumption] for advertising in the United States" and that advertising effects estimated outside the United States are "diminished to the point of nonexistence," and that when one assesses the effects of "changes in advertising that have occurred in the market, . . . brand and category shares change, [but] total alcohol consumption is unaffected." The title page and "Summary and Conclusions" chapter of Dr. Fisher's book is attached hereto as Exhibit 5.

10. As part of my 1993 report, I myself conducted yet another review of the literature on the effects of alcoholic beverage advertising on total alcohol consumption, including the research that has appeared since Smart's survey. The studies published since the FTC and Smart reviews provide no reason to alter the conclusions reached in the earlier reviews. Rather, recent research (including my own, which is described below) has reinforced the view that alcoholic beverage advertising does not have a significant effect on consumption. *See* Exhibit 1 at 3-20.

11. I wish to emphasize that a wide variety of methods were employed in the research literature examined by the FTC report, Dr. Smart's study, Dr. Fisher's review and my own report. What makes this research literature

so forceful is the consistency of results despite the use of radically different approaches. Research on alcoholic beverage advertising has taken four basic approaches. The first uses actual market data—including advertising expenditures, recorded alcohol consumption, prices of alcoholic beverages, and so on—in order to isolate the effects of advertising after taking into account the effects of other forces such as prices and consumer incomes. The second approach also uses actual market data, but focuses specifically on the effects of partial or complete bans on alcoholic beverage advertising. Again, the goal is to isolate the effects of advertising restrictions after taking into account other factors. The third approach involves "experiments" in which advertising's effects are examined in a controlled environment. The fourth (and on the whole the least useful) approach is to conduct surveys on drinking attitudes or drinking behavior, and on exposure to advertising, in order to discover whether there is a relationship between advertising and either attitudes or behavior. As the FTC staff, Dr. Smart and Dr. Fisher recognized, and I will explain in greater detail below, no substantial causal connection between advertising and consumption has been found regardless of the research approach chosen.

Research Using Actual Market Data on Advertising and Sales

12. The leading market data study of the United States, was published by George Franke and Gary Wilcox in 1987, and entitled "Alcoholic Beverage Advertising and Consumption in the United States." The authors concluded at page 28 of their report that advertising did not substantially affect total consumption, and noted that such a conclusion was consistent with previous research on other nations. A copy of the Franke and Wilcox study is attached hereto as Exhibit 6.

13. Market data on markets in other nations also support the finding that advertising has little or no effect

on total consumption. Martyn Duffy has produced a series of studies of the United Kingdom alcoholic beverage market. Using a variety of data bases and statistical methods, he concluded that advertising bans would have little or no effect on sales, and cited numerous other studies of the United Kingdom market that reached essentially the same conclusion. A copy of the most recent Duffy study is attached hereto as Exhibit 7.

14. As part of my 1993 report, I completed a study using the market data approach. I conducted a statistical analysis of alcoholic beverage advertising and sales in the United Kingdom, France, Germany, and the Netherlands and found that advertising had no effect on consumption in any of these nations. *See* Exhibit 1 at 42-43. Market data from five major Western nations has now been examined in our research or in other studies already cited. In no case has the analysis revealed any significant connection at all (not to mention a causal connection) between advertising and total alcohol consumption.

Research on Partial or Compete Advertising Bans

15. Researchers who take the second approach use market data to analyze the effects of partial or complete bans on alcoholic beverage advertising. Here, too, the results consistently fail to show that advertising has a significant effect on consumption.

16. The reviews conducted by the FTC staff,, by Dr. Smart, by Dr. Fisher and myself examined the existing research on the effects of advertising bans. All these reviews concluded that careful comparisons of market sales and other factors before and after imposition of an advertising ban provide no reason to think that the bans reduced total consumption of alcoholic beverages. *See* Exhibit 3, Appendix A at 11-12; Exhibit 4 at 316; Exhibit 5 at 116-120; Exhibit 1 at 10-11.

17. A study conducted by Alan C. Ogborne and Reginald Smart examined data on advertising bans in Canada and the United States. The Canadian data compared alcohol consumption during a particular time period in two provinces, one of which imposed an advertising ban midway through the time period. The study found no apparent effect from the ban. The same conclusion was reached based on data concerning advertising bans in certain of the United States. A copy of the Ogborne and Smart study is attached hereto as Exhibit 8.

18. A recent study by Henry Saffer found that European nations that had restricted alcohol advertising had lower levels of alcohol beverage consumption. Dr. Saffer's study did not attempt to assess whether lower consumption was caused by the advertising restrictions, however. A vigorous critique of this study by Douglas Young pointed out that the data strongly indicate that lower drinking rates were probably the cause of the advertising bans (rather than the other way around), and that partial advertising bans are associated with *increases* rather than decreases in alcoholic beverage consumption. Dr. Saffer's study is attached hereto as Exhibit 9. Dr. Young's critique is attached hereto as Exhibit 10.

Research Using Controlled Environments

19. By employing the third approach, namely, experiments, several researchers have attempted to assess the effect of advertising under controlled conditions. The usual approach is to randomly select people into two or three groups, each of which is shown different sets of advertisements. The researchers then examine whether the groups that viewed alcoholic beverage advertisements purchased or drank more alcohol than the groups that did not. Again, the results of these experiments demonstrate a lack of effect on consumption from advertising of alcoholic beverages.

20. The results of the most recent experimental study, by Angela Lipsitz, Greg Brake, Eric John Vincent and Mark Winters, are most telling. These researchers conducted an experiment in which 5th and 8th graders were divided into three groups that watched either soft-drink commercials, beer commercials that included anti-drinking messages, or beer commercials that did not include anti-drinking messages. After watching the commercials, the three groups did not express any significant differences in their attitudes about drinking. In the abstract at page 439 of their report, the authors state their conclusion that "[t]he failure of beer commercials to create positive alcohol expectancies is consistent with limited and null findings of previous investigations. Research to date does not support a ban on alcohol advertising." They also state that "[t]heoretically, a ban makes sense; empirically, it cannot yet be justified." A copy of the Lipsitz, Brake, Vincent and Winters study is attached hereto as Exhibit 11.

The Prevention Committee Report and Its Attempted Reliance on Surveys

21. A review of the Preamble to the Ordinance reveals that Baltimore ignored all the evidence described above, including the authoritative reports from the FTC staff and the Addiction Research Foundation. Instead, Baltimore unsuccessfully attempts to demonstrate a causal connection between advertising and alcohol consumption based on a recent report by the Prevention Committee of Maryland Governor Schaefer's Drug and Alcohol Abuse Commission (the "Prevention Committee Report"). The Prevention Committee Report is attached hereto as Exhibit 12.

22. The Prevention Committee Report ignored the bulk of the research literature on the effects of alcoholic beverage advertising and reviewed an extremely selective

sample of the literature. Although the Prevention Committee Report stated at page 13 that it had reviewed "scores of studies, reports and articles on alcohol advertising," I found only eight items in the list of references that specifically addressed alcohol advertising, and some of these items derived from a single study. From the vast body of academic literature on alcoholic beverage advertising, the Prevention Committee Report selected only three studies for review: a federally funded project by Charles Atkin and Martin Block, a report by Donald Strickland, and an unpublished report for the American Automobile Association by Lawrence Wallack, Diana Cassady and Joel Grube.

23. Each of the above studies relied on by the Prevention Committee Report consists primarily of consumer surveys. As I mentioned earlier, surveys are another of the research methods used to study the effects of alcoholic beverage advertising. A survey is essentially a questionnaire. Typical questions ask about drinking attitudes, drinking behavior, amount of exposure to advertising or a particular advertising medium (usually television), and attitudes toward advertising. The researchers then attempt to draw connections between advertising and consumption of alcoholic beverages based on the survey responses.

24. Surveys, however, are of limited usefulness because they only reveal correlations or patterns of facts, without explaining whether causal relationships exist among the various facts. In other words, surveys cannot explain why a correlation exists, and therefore, can provide little if any information as to *why* people drink. For example, a survey may reveal that beer drinkers are more aware than non-drinkers of beer advertisements. The surveys cannot explain, however, whether the advertisements caused viewers to drink beer, or whether people who drink are more inclined to pay attention to advertisements for beer, or whether some third factor led both to beer

consumption and to a tendency to enjoy beer advertisements. In fact, the most frequent criticism leveled at survey results is that surveys reveal little beyond the fact that people who drink pay more attention than nondrinks to alcoholic beverage advertisements. This observation applies quite generally to product markets—os as some people have said, "Volvo owners watch Volvo ads."

25. Despite this inherent limitation, researchers do use surveys to gain insight into drinking trends, and again the results are consistent with findings from other research methods that advertising does not have a significant impact on underage drinking. Even where surveys reveal correlations in which people who react positively to alcoholic beverage advertising also drink alcoholic beverages, researchers are very reluctant to conclude that advertising *caused* such behavior.

26. The survey results are notable for what they do *not* demonstrate about advertising; namely, that it is a reason why people drink. The largest single body of survey data comes from a federally funded project by Charles Atkin and Martin Block, upon which the authors of the Prevention Committee Report heavily relied. The results of this study were published by Dr. Atkin and various co-authors over a period of several years. One article, published by Dr. Atkin with Kimberly Neuendorf and Steve McDermott, describes a survey in which teenagers and young adults were asked about their exposure to alcoholic beverage advertising, their drinking behavior, and the extent to which they perceived advertising as influencing their choices about whether to drink and how much to drink. The survey revealed that to a small extent, persons who engaged in abusve drinking tended to see more alcoholic beverage advertising than persons who did not engage in abusive drinking. The authors did not attempt, however, to demonstrate that advertising was a

cause of the abusive behavior. In fact, the authors warned at pages 323-324 that one could not infer from these results that advertising was a cause of the hazardous behavior. A copy of the Atkin, Neuendorf and McDermott study based on the Atkin and Block survey is attached hereto as Exhibit 13.

27. A second article based on the Atkin and Block survey, written by Charles Atkin, John Hocking, and Martin Block, describes the results of asking teenagers about their alcohol consumption and their exposure to mass media. They found that teenagers who drank or who were more interested in drinking tended to see more advertising for alcoholic beverages. The authors did not attempt to demonstrate that advertising caused teenagers to consume alcohol or to be interested in alcoholic beverages. Rather, they warned at page 165 that "[a]dvertising is not necessarily the causal event in the relationship." A copy of the Atkin, Hocking, and Block study, also based on the Atkin and Block survey, is attached hereto as Exhibit 14.

28. Surveys by Donald Strickland, upon which the Prevention Committee Report also relied, reached similar conclusions. Dr. Strickland asked a large sample of adolescents whether they drank alcoholic beverages and about their drinking behavior. He also asked how much television they watched and what types of programs they preferred. As with the Atkin and Block survey, the goal of Dr. Strickland's survey was to determine the amount of exposure to alcoholic beverage advertising and to assess whether exposure to advertisements was related to drinking behavior. A complex analysis of the data revealed only a very small correlation between advertising exposure and drinking behavior. Strickland concluded at 318 that his "findings fail to sustain the argument that alcohol advertising is a primary factor in drinking behavior," and that "reducing the amount of advertising for

alcoholic beverages is likely to have a negligible impact on the level of consumption among teenagers." A copy of the Strickland survey report is attached hereto as Exhibit 15.

29. Lawrence Wallack, Diana Cassady and Joel Grube conducted a survey of young people for the American Automobile Association. They found that exposure to beer advertising was positively correlated to several measures including brand recognition and recall, drinking expectations for adulthood, and beliefs about social aspects of drinking. They did not attempt, however, to demonstrate a causal relationship between advertising and these attitudinal and awareness measures. A copy of the Wallack, Cassady and Grube survey report is attached hereto as Exhibit 16.

30. Researchers have strongly criticized attempts to conclude, based on survey results, that alcoholic beverage advertising causes consumption. Dr. Strickland, one of the authorities that the Prevention Committee Report relied upon, criticized numerous aspects of the Atkin and Block study, and specifically criticized inferences from the Atkin and Block study that advertising is a cause of underage drinking. Dr. Strickland's critique of the Atkin and Block study is attached hereto as Exhibit 17.

31. In its review of the literature on alcoholic beverage advertising, the FTC staff specifically addressed the Atkin and Block survey, and stated at 21 that ". . . the general conclusion is that the work of Atkin & Block suffers from methodological flaws serious enough that it cannot be used to draw any conclusions concerning the effect of advertising on the total demand for alcohol or on the degree of alcohol abuse." *See* Exhibit 3 at page 121. Dr. Smart, in his review of the literature on the effects of alcoholic beverage advertising, also specifically stated at page 317 that "[w]e should be wary about the correlations in Atkin and Block's study and reject the

conclusion that alcohol advertising leads to or causes drinking or heavy drinking." *See* Exhibit 4 at page 317.

32. Drs. Atkin and Block themselves emphasized in their original report that their surveys found no more than a correlation between advertising and actual behavior, and that their data provided little reason to conclude that the advertising *caused* drinking behavior. On page 1 of their Executive Summary, they stated ". . . the design of these studies does not enable cause and effect to be inferred. If the analyses show that two or more variables are positively related (*e.g.*, higher levels of reported advertising exposure are associated with higher levels of drinking), it should not be concluded that one variable is necessarily causing the other. It is possible that reverse causation may be operating (*e.g.*, drinking may cause exposure, rather than exposure causing drinking), or that the two variables are related because of some common outside forces." They add, ". . . these findings should be regarded as suggestive and tentative rather than definitive." A copy of the title page and Executive Summary of the original Atkin and Block report is attached hereto as Exhibit 18.

33. When later publications tried to use Atkin and Block's survey results to claim a stronger, causal relationship between advertising and consumption, Dr. Block himself objected. In an appearance at hearings before the United States Senate, Dr. Block repudiated suggestions that his research documented a significant relationship between youth exposed to advertising and problem drinking. At page 2 of his testimony transcript, Dr. Block stressed that his study "provides no justification for restrictions on or curtailment of alcohol advertisements." Dr. Block's Senate testimony is attached hereto as Exhibit 19.

34. Baltimore's reliance on surveys to support the premise that there is a causal link between advertising and

drinking vastly overstates the findings of those studies and ignores the qualifications that the researchers themselves imposed on the survey findings. Moreover, none of the studies cited in the Prevention Committee Report and relied upon by Baltimore even attempted to assess how advertising affects behavior in actual markets. Indeed, the Prevention Committee Report ignored the entire body of market data studies, which consistently failed to find any connection between advertising and consumption. *See* this Affidavit at pages 6-8.

35. The Prevention Committee Report also refers briefly to a U.S. Department of Health and Human Services Report entitled "Seventh Special Report to the U.S. Congress on Alcohol and Health" (the "Special Report") as evidence that children acquire expectations of drinking before they ever begin to drink. However, the Prevention Committee Report fails to mention that the Special Report does not attribute the creation of expectations to advertising. The "Special Report" concludes at page 211 that "research has yet to document a strong relationship between alcohol advertising and alcohol consumption." A copy of chapter IX of the Special Report is attached hereto as Exhibit 20.

The Primary Influences on Underage Drinking

36. Contrary to the view presented by the Prevention Committee Report, the central finding in research on the sources of drinking behavior has been that drinking decisions are dominated not by advertising, but by social forces, especially the influences of parents and peers. This is apparent in the literature review cited above by Dr. Smart of the Addiction Research Foundation, who states at page 315 of his review that "[b]ecause factors such as price and social influences most affect decisions to drink, the influence of advertising is likely to be relatively small." *See* Exhibit 4 at 315. The dominance of social factors is also illustrated in original research by Dr. Smart

on the demand for various products including alcoholic beverages. A copy of Dr. Smart's 1987 review of social factors in drinking is attached hereto as Exhibit 21.

37. Dr. Strickland, whose research was relied upon in the Prevention Committee Report, specifically stated that in his research ". . . advertising was shown to have meagre effects on the level of consumption, and these effects rarely translated into effects on alcohol problems," and that "[i]n contrast to the advertising effects, a set of interpersonal influences, especially differential peer association, was shown to have significant impact on both consumption levels and alcohol abuse behavior." These remarks are contained at page 221 in a 1983 review article by Dr. Strickland attached hereto as Exhibit 22.

Recent Trends in Alcoholic Beverage Consumption and Advertising

38. Recent trends in alcohol consumption belie the Ordinance's basic premise. Despite very large changes in the volume of beer advertising—including a nearly threefold increase between 1974 and 1986, followed by a steep drop in the early 1990s to approximately the level of 1978—overall consumption remained essentially constant. A chart based on this data from the Beer Institute reflects this fact and is attached hereto as Exhibit 23.

39. Data from the U.S. Department of Health and Human Services show that beer consumption trends in the State of Maryland have closely paralleled those in the United States as a whole, and that total alcohol consumption has declined more rapidly in Maryland than in the rest of the nation. The federal report containing these data are attached hereto as Exhibit 24.

40. The patterns of advertising and consumption in the United States beer market are typical of trends in the other developed economies. In France, for example, advertising expenditures for all alcoholic beverages more

than tripled between 1977 and 1989, while per capita consumption decreased about 15%. A figure illustrating these data is attached hereto as Exhibit 25. In Sweden, by contrast, all advertising for alcoholic beverages was banned in 1978, yet consumption since then has declined by only about 3% Swedish data are presented in Figure 5 of my 1993 report. *See* Exhibit 1 at page 26. The British, German and Dutch markets, in which alcoholic beverage advertising was permitted, revealed negligible increases or, more often, decreases in total alcoholic beverage consumption during the past fifteen or twenty years, despite in some cases great increases in total expenditures for alcoholic beverage advertising. *See* Exhibit 1 at pages 24 and 25, Figures 2 through 4.

41. Moreover, in the face of large increases in beer advertising in this country, teenage drinking and abuse have actually declined. The National Institute for Drug Abuse and the University of Michigan issued a report entitled "Drug Use Among American High School Seniors." This report shows that teenage drinking declined steadily throughout the 1980s and into the 1990s. A chart reflecting these figures is attached hereto as Exhibit 26. Similarly, the National Highway Traffic and Safety Administration ("NHTSA") has published figures that show that traffic fatalities involving teenagers and drunk driving have declined 47 percent since 1982. A chart based on NHTSA data is attached hereto as Exhibit 27.

42. Data for the State of Maryland also show substantial improvements in recent years. During 1982-1992, the number of drivers under age twenty-one who were involved in fatal accidents and had a blood alcohol content (B.A.C.) of 0.10% or greater declined from about 40 in the peak year of 1985 to about 10 in 1992 (a 75% reduction). A similar reduction occurred for drivers with lesser blood alcohol (B.A.C. of 0.01-0.09%). Overall the proportion of under 21 drivers involved in fatal acci-

dents who had positive B.A.C. levels has declined from over 40% to 17%. A chart reflecting these figures is attached hereto as Exhibit 28.

43. To sum up, the proposal to eliminate alcoholic beverage advertising on billboards in Baltimore has been presented as a means to reduce underage consumption of alcoholic beverages and thus "promote" temperance. This proposal rests upon an incorrect view of how advertising works and of the factors that lead to drinking. While there is no serious question that advertising can affect sales of brands, decades of research have failed to find a causal relationship between advertising and the total consumption of alcoholic beverages. Indeed, this research strongly suggests that such a connection does not exist. The research findings are consistent with recent trends which shows that teenage consumption and abuse of alcoholic beverages has declined despite substantial increases in the number of beer advertisements. Rather than enacting advertising restrictions, a far more promising approach for Baltimore would be to provide educational programs designed to assist children in resisting the pressures and influences that lead to drinking and abuse.

/s/ John E. Calfee
JOHN E. CALFEE

APPENDIX L

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. HAR-94-145

PENN ADVERTISING OF BALTIMORE, INC.,
Plaintiff,

v.

THE MAYOR AND CITY COUNCIL
OF THE CITY OF BALTIMORE, *et al.*,
Defendants.

DECLARATION OF JAMES W. FISHER, II

I, James W. Fisher, II, hereby declare and state as follows:

1. My name is James W. Fisher, II. I have over sixteen years of experience in the outdoor advertising industry and presently serve as the General Manager of Penn Advertising of Baltimore, Inc. ("Penn Advertising"). In that capacity, I am personally familiar with the business of Penn Advertising. Accordingly, I am aware of the impact that enforcement of Article 30, Section 10.0-1(H) and Article 30, Section 11.0-7 of the Baltimore City Code, as promulgated by City Council Bill No. 626 (collectively referred to as the City of Baltimore's "Advertising Ban"), which was enacted on or about January 6, 1994, will have on the business of Penn Advertising when it becomes effective on February 5, 1994.

2. Penn Advertising is a Delaware Corporation authorized to do business in the City of Baltimore and elsewhere in the State of Maryland. Penn Advertising's princi-

pal place of business is in the City of Baltimore at 3001 Remington Avenue, Baltimore, Maryland 21211.

3. Penn Advertising is in the outdoor advertising business in the City of Baltimore and elsewhere in the State of Maryland. Penn Advertising leases land from private property owners and erects and maintains outdoor advertising sign structures on those locations. Penn Advertising then disseminates commercial and noncommercial advertising on its sign structures and makes these sign structures available to the public for the dissemination of commercial and noncommercial messages. Outdoor advertising signs were among the first mass media for communications in the City of Baltimore. Penn Advertising's lineal predecessor company began operations in the 1800s. Outdoor advertising signs have been used as a medium to disseminate alcoholic beverage advertising in the City of Baltimore for many decades.

4. Advertising messages concerning alcoholic beverages are among the advertising messages that Penn Advertising has disseminated in the past, is currently disseminating, and intends to disseminate in the future on its signs in the City of Baltimore. The messages are truthful and concern products that are lawful in the City of Baltimore and the State of Maryland.

5. As a result of the enactment of the Advertising Ban, Penn Advertising will be required to remove many advertisements concerning alcoholic beverages from its billboards on or before February 5, 1994. As preexisting contracts for the remaining alcoholic beverage advertisements expire, Penn Advertising will no longer be able to post advertisements concerning alcoholic beverages on any of its billboards subject to the prohibitions of the Advertising Ban.

6. I am concerned that the Advertising Ban imposes criminal liability upon myself, the employees of Penn

Advertising, and Penn Advertising itself. Accordingly, I am deeply concerned that the City of Baltimore will institute criminal prosecutions against myself, the employees of Penn Advertising, and Penn Advertising during the pendency of Penn Advertising's suit challenging the Advertising Ban. Neither Penn nor I am willing to risk this threatened criminal prosecution. Therefore, Penn Advertising will be forced to comply with the prohibitions contained in the Advertising Ban during the pendency of Penn Advertising's suit challenging the Advertising Ban unless the City is prevented by the United States District Court from enforcing the Advertising Ban pursuant to a preliminary injunction.

7. In my professional opinion, other local Baltimore advertising media, such as newspapers, magazines, radio and television stations and Oriole Park at Camden Yards, will also attempt to use the prohibitions in the Advertising Ban and the general obloquy that the Advertising Ban casts on billboards to divert advertising for alcoholic beverages and other products and services from Penn Advertising to these other media. For example, Mass Transit Communications ("MTC") holds a contract with the Mass Transit Authority of the State of Maryland ("MTA") for the placement of advertising on MTA busses. These are the busses that are used to transport thousands of children to school in the City of Baltimore each day. Recently, I saw a letter that MTC sent to certain alcoholic beverage advertisers describing the prohibitions on the placement of alcoholic beverage advertising on outdoor advertising signs contained the Advertising Ban and urging these advertisers to place alcoholic beverage advertising on MTA vehicles to replace the audience exposure they will lose as a result of the Advertising Ban. Thus, MTC has attempted to use the enactment of the Advertising Ban to divert advertising business from Penn Advertising's outdoor advertising signs to signs on MTA vehicles.

8. The adverse impact of the Advertising Ban on Penn Advertising described in paragraphs 6 and 7 above, will be very substantial. At the current time, I estimate that, when fully effective, the prohibitions contained in the Advertising Ban will cause Penn Advertising to lose advertising revenue of approximately $100,000 per month. This lost revenue cannot be made up from other advertisers in the short run. Even if the advertising loss can be made up in the long run with advertising for other products and services, which may or may not be possible, Penn Advertising will have to expend substantial time and expense in identifying, selling and servicing replacement advertisers. The revenue losses caused by the Advertising Ban may force Penn Advertising to remove some sign locations in Baltimore City in order to cut expenses. It would be extremely difficult and expensive for Penn Advertising to rebuild or replace these signs once they are removed due to zoning restrictions in the City of Baltimore.

9. The Advertising Ban will not merely cause Penn Advertising to lose alcoholic beverage advertisers. Advertising is a "hyper-competitive" and fickle enterprise. Once it became known that Penn Advertising was being criminally prosecuted for violating the Advertising Ban, some of Penn Advertising's clients that do not advertise alcoholic beverages would fear that the public might associate their unrelated product and services with Penn Advertising's criminal prosecution. These advertisers would cease using Penn Advertising's billboards to disseminate their message and would change their marketing strategy by developing advertising campaigns for alternative media.

10. Once an advertiser has moved its advertising dollars to other media, it will be extremely difficult for Penn Advertising to persuade the advertiser to move all of those diverted advertising dollars back to Penn Advertising, even if Penn Advertising can show the advertiser a court decision striking down the Advertising Ban's pro-

hibitions. This is because a change in media strategy quickly becomes imbedded in an advertiser's overall marketing strategy. Once an advertiser changes this strategy, it becomes extremely costly and difficult for an advertiser to again readjust its strategies. Therefore, the Advertising Ban's prohibitions will cause Penn Advertising substantial and permanent injury unless this Court issues a preliminary injunction preventing enforcement of the Advertising Ban. The extent of such injury to Penn Advertising, even if the Court ultimately found the Advertising Ban to be invalid, would be difficult to quantify and probably would continue indefinitely into the future.

11. As the General Manager of Penn Advertising, I am both personally and professionally concerned that Penn Advertising not violate a law with criminal penalties. Unfortunately, the vague wording of the Advertising Ban has left me unsure as to what advertisements are permitted by the Advertising Ban.

12. I refer in the balance of this Declaration to Advertisements that have previously appeared on Penn Advertising's signs in Baltimore to illustrate the uncertainty created by the Advertising Ban's wording. The examples I use certainly are not an exhaustive recitation of those advertisements that Penn Advertising has disseminated that may be prohibited by the Advertising Ban.

13. Exhibits A and B are photographs of advertisements for the "Budweiser International" horse race held at the Laurel Race Course. While these advertisements are promoting a horse race and not an alcoholic beverage, the name and logo of a well known beer are prominently displayed in the advertisements. Therefore, I am concerned that advertisements such as Exhibits A and B could be classified as advertisements that advertise alcoholic beverages. Penn Advertising and I simply do not have any way of knowing with any degree of confidence whether or not Penn Advertising or I would be committing a crime under the Advertising Ban if Penn Adver-

tising disseminated an advertisement similar to those in Exhibits A and B.

14. Exhibit C is an advertisement placed by Anheuser Busch, Inc., which includes the same "Eagle" logo that prominently appears on many of Anheuser-Busch's alcoholic beverage containers and in many of their alcoholic beverage advertisements. The advertisement also contains a picture of a mug of beer, together, with the words "Know When to Say When" and "Drink Responsibly." Other marketers of alcoholic beverages, such as the House of Johnnie Walker, have also sponsored advertisements on the themes of responsible drinking that similarly identify the advertiser (*see* Exhibit D). I am concerned that, since advertisements such as those depicted in Exhibits C and D address alcohol and disclose the sponsorship of marketers of alcoholic beverages, such advertisements arguably could be prohibited by the Advertising Ban. Penn Advertising and I simply do not have any way of knowing with any degree of confidence whether or not Penn Advertising would be committing a crime under the Advertising Ban if Penn Advertising ran advertisements similar to those depicted in Exhibits C and D.

15. Alcoholic beverage marketers also have sponsored advertisements on Penn Advertising's outdoor advertising signs which are not directly related to alcoholic beverages. Exhibit E contains an example of an advertisement for a fund raising cruise on the "Bay Lady" to benefit the Chesapeake Bay wherein Budweiser is identified in the advertisement as a co-sponor. Budweiser also is identified as a co-sponsor of a recycling advertisement ("Don't Throw It Away"), which is included herein as Exhibit F, and as a sponsor of an advertisement urging support for the Lou Rawls' United Negro College Fund Telethon, which is included herein as Exhibit G. All of these advertisements identified Budweiser as either the sponsor or a co-sponsor. I am concerned that public service advertisements like those in Exhibits E, F, and G can be

viewed as advertisements that are prohibited by the Advertising Ban.

16. Beyond this, as the advertisements depicted in Exhibit H indicate, many advertisements displayed by alcoholic beverage marketers also name the alcoholic beverages being advertised and disseminate slogans, logos, and messages concerning alcoholic beverages. Each of these advertisements is prohibited by the Advertising Ban. The risk of criminal prosecution pursuant to the Advertising Ban will preclude Penn Advertising and I from disseminating advertisements similar to those in Exhibit H.

17. In conclusion, Penn Advertising will suffer very serious, indeed irreparable, injury unless this Court preliminarily enjoins the City from enforcing the Advertising Ban's prohibitions during the pendency of Penn Advertising's suit challenging the validity of the Advertising Ban. This injury will take two forms: serious, and probably unrecoverable, financial losses and the temporary abandonment of all messages that pertain to alcoholic beverages in any respect or which identify a marketer of alcoholic beverages as a sponsor.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 28, 1994.

/s/ James W. Fisher, II
JAMES W. FISHER, II

Supreme Court, U.S.
FILED
MAR 27 1997
CLERK

No. 96-1428

In The

Supreme Court of the United States

October Term, 1996

ANHEUSER-BUSCH, INC. and PENN ADVERTISING OF BALTIMORE, INC.,

Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; CITY COUNCIL OF BALTIMORE CITY; and DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION

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23 pp

QUESTIONS PRESENTED

In an effort to reduce illegal consumption of alcohol by minors, Baltimore enacted an ordinance which restricts the placement of publicly visible alcohol advertisements. The questions presented are:

1. In determining the First Amendment constitutionality of a speech restriction on promotional advertising, may the reviewing court judicially notice the principle that promotional advertising increases consumption, and, if not, should the predictive judgments of the legislature supporting the restriction receive judicial treatment as adjudicative or legislative facts?

2. Is a restriction against publicly visible alcohol advertising in areas where children live, attend school, and engage in recreation, more extensive than necessary to achieve the governmental purpose of reducing illegal alcohol consumption by minors?

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BRIEF IN OPPOSITION

Respondents (collectively "Baltimore") urge that the petition for a writ of certiorari to review the judgement of the United States Court of Appeals for the Fourth Circuit, entered 13 November 1996, be denied for the reasons set forth below.

STATEMENT

A. The Ordinance

All that was before the lower courts, and all that is before this Court, is Baltimore City Ordinance 288 (1994) (the "ordinance"). App., 17a-18a. Petitioners' reference to a "subsequently enacted" ordinance, Pet., 5, which was not mentioned in their complaints nor considered by the courts below, is improper and unavailing.

B. The District Court Proceedings

The basis for the lower courts' treatment of Petitioners' complaints as raising only a facial challenge to the ordinance is set forth in the opinion of the court of appeals in *Anheuser-Busch I* App., 37a-38a. As the Fourth Circuit observed, "as-applied review of the ordinance must await an actual or threatened enforcement of the ordinance against a particular billboard." App., 39a.

C. The Fourth Circuit's Initial Decision (*Anheuser-Busch I*)

Petitioners assert that the Fourth Circuit "refus[ed] to engage in judicial review" in *Anheuser-Busch I*. Pet., 7. To the contrary, the court had before it the entire legislative record supporting the ordinance, including research studies showing a definite correlation between alcohol advertising and underage drinking.[1] The court made an assessment of whether the legislative record demonstrated that the ordinance will directly and materially reduce underage drinking, and the court concluded that it will.

> The proper standard for approval must involve an *assessment* of the reasonableness of the legislature's belief that the means it selected will advance its ends. Under that approach, *we* conclude that Baltimore has met its burden of satisfying the third prong of *Central Hudson*.

App., 32a (emphasis added).[2]

Furthermore, the judicial review undertaken by the court included an assessment of Baltimore's assertion (independent of the record evidence) that a reduction of publicly visible promotional advertising of alcohol will

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[1] The court's summarization of the legislative record is set forth in App., 19a-21a and 35a-36a.

[2] Similarly, in an earlier part of its opinion, the court, relying on *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371 (1995), stated that "[i]f it *appears to the court* that the legislative body could reasonably have believed, based on data, studies, history, or common sense, that the legislation would directly advance a substantial governmental interest, the government's burden of justifying it is met." App., 25a (emphasis added).

reduce demand for alcohol among minors as matter of law. The court relied on *Central Hudson Gas and Elec. Corp. v. Public Service Comm'n of New York*, 447 U.S. 557, 569 (1980), and *United States v. Edge Broadcasting Co.*, 509 U.S. 418, 428 (1993), for its conclusion that Baltimore sufficiently demonstrated its ordinance will directly advance its purpose. App., 29a-31a.[3]

Petitioners also assert that "the court found that Baltimore had no burden to explain its rejection of" non-speech related alternatives to the ordinance. Pet., 9. To the contrary, what the court said was this:

> Turning to the fourth prong of the *Central Hudson* scheme, we must determine whether the government has demonstrated that its regulation of commercial speech "is not more extensive than is necessary" to serve the stated governmental interest. [*Central Hudson,*] 447 U.S. at 556, 100 S. Ct. at 2343. In other words, the means selected to regulate speech must be narrowly tailored to serve a substantial state interest. See *Florida Bar*, ___ U.S. at ___, 115 S. Ct. at 2375-77; *Board of Trustees of State Univ. of New York v. Fox*, 492 U.S. 469, 478, 109 S. Ct. 3028, 3033-34, 106 L.Ed.2d. 388 (1989).

App., 33a.

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[3] In so holding, the court expressly aligned itself with two other courts of appeal "in holding that restricting the outdoor advertising of alcoholic beverages directly and materially advances the campaign against underage drinking." App., 32a-33a (following *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 750 (5th Cir. 1983) (en banc), *cert denied*, 467 U.S. 1259 (1984), and *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490 (10th Cir. 1983), *rev'd on other grounds sub nom. Capital Cities Cable Inc. v. Crisp*, 467 U.S. 691 (1984).

The possibility of increasing enforcement of criminal laws against underage drinking, or of a government educational campaign against underage drinking, did not, in the court's view, render Baltimore's ordinance more burdensome than necessary to achieve its purpose. Rather, citing *Packer Corp. v. Utah*, 285 U.S. 105, 110 (1932), the court observed that "[t]hrough outdoor advertising, children are involuntarily and unavoidably confronted daily with the advertised message." App., 36a. Because Baltimore's concern . . . is that advertising will unduly promote alcohol consumption despite known dangers," the court concluded the ordinance did not restrict speech unnecessarily. App., 35a (quoting *Dunagin, supra*, 718 F.2d at 751). And, the court held in rejecting the fourth prong challenge, the ordinance "still permits adults to receive advertising messages and information from signs in commercial areas in the City and through the numerous other media through which adults are constantly exposed." App., 36a.

D. The Fourth Circuit's Decision on Remand (*Anheuser-Busch II*)

On remand from this Court, the court of appeals reconsidered the case in light of *44 Liquormart Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996). The court found that case not to have displaced the *Central Hudson* test under which *Anheuser-Busch I* was decided, and, furthermore, that *44 Liquormart* was distinguishable. The court, therefore, readopted its decision in *Anheuser-Busch I*. App., 3a.

In readopting its decision in *Anheuser-Busch I*, however, the court stated the following regarding *Posadas de*

Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986):

> In readopting our opinion, we do not continue to rely on *Posadas* . . . in view of the doubt placed on that opinion by a majority of the Court in *44 Liquormart* . . . . Because we do not blindly defer to the legislative rationale, but rather agree with it based on our own independent conclusion about the fit between [the] legislative objective and the regulation used to achieve that objective, the holding in *Posadas* is not necessary to our opinions upholding Baltimore City's ordinance.

App., 3a.

The court characterized its decision in *Anheuser-Busch I* as having involved "our own independent assessment . . . [of] the reasonableness of Baltimore City's legislative finding that there is a 'definite correlation between alcoholic beverage advertising and underage drinking.' " App., 4a (quoting *Anheuser Busch I*, App., 31a).

The court observed that its holding in *Anheuser-Busch I* on the fourth prong of the *Central Hudson* test had been "[b]ased on our close look at Baltimore's asserted goal and the billboard zoning used to achieve that objective." App., 4a. The court found *44 Liquormart* distinguishable on the facts. Unlike the blanket ban on price advertising involved there, the court observed, this case involves a limited restriction which "does not foreclose the plethora of newspaper, magazine, radio, television, direct mail, Internet, and other media available to Anheuser Busch and its competitors." App., 7a.

Furthermore, the court observed in distinguishing *44 Liquormart*, enactment of Baltimore's ordinance was not an attempt "to undermine democratic processes and circumvent public scrutiny by substituting a ban on advertising for a ban on the product, as the *44 Liquormart* Court feared was the case with Rhode Island." App., 7a. Since underage drinking is illegal in Baltimore, the ordinance "reinforce[s] the democratic decisionmaking mechanism's conclusion as to the dangerousness of underage drinking by protecting children from exposure to advertising which the legislature reasonably considers harmful in itself to children's maturation." App., 8a.

REASONS FOR DENYING THE WRIT

THERE IS NEITHER APPARENT NOR ACTUAL CONFLICT BETWEEN THE FOURTH CIRCUIT'S DECISION AND THIS COURT'S DECISIONS

This case presents no compelling reason for review by this Court. The Fourth Circuit's decision was a correct application of the standards set forth in *Central Hudson* and its progeny, and was decided with faithful reference to *44 Liquormart*.

A. The *Central Hudson* Third Prong

Rather than conflicting with decisions of this Court, the decision of the Fourth Circuit is quite apparently consistent with them. The lower court upheld the ordinance under the third prong of the *Central Hudson* test because "[a]fter our own independent assessment, we

recognized the reasonableness of Baltimore's legislative finding that there is a 'definite correlation between alcohol beverage advertising and underage drinking.' " App., 4a. That holding is supported by a host of holdings and pronouncements from this Court. *See, Central Hudson,* 447 U.S. at 569 (third prong satisfied based on common sense); *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 509 (1981) (same) (plurality); *Turner Broadcasting System, Inc. v. FCC,* 512 U.S. 622, 666 (1994) (judicial obligation to exercise independent judgment when First Amendment rights are implicated is to assure itself that government adduces "either empirical support or at least sound reasoning on behalf of its measures") (citation omitted); *Edenfield v. Fane,* 507 U.S. 761 (1993) (citing with approval *Central Hudson,* 447 U.S. at 569 (*supra*)); *Edge,* 509 U.S. at 428 (third prong satisfied based on common sense); *Florida Bar v. Went For It, Inc.,* 115 S. Ct. at 2371, 2378 (1995) (empirical support justifying speech restrictions need not be "accompanied by a surfeit of background information," and speech restrictions may be upheld based on "simple common sense") (citation omitted); *44 Liquormart,* 116 S. Ct. at 1511 (Part VI) (Stevens, J., concurring) (commercial speech doctrine "recognize[s] some room for the exercise of legislative judgment").

In view of the demonstration which Baltimore made in the lower courts in support of its ordinance, and in view of the Fourth Circuit's "own independent assessment" of that demonstration, App., 4a, if the Fourth

Circuit had done anything other than uphold the ordinance under the third prong of the *Central Hudson* test then its decision would have been directly in conflict with the decisions of this Court.

Baltimore met its burden under the *Central Hudson* third prong with both empirical support and sound reasoning. This Court has recently held that restrictions on commercial speech may be justified based on "simple common sense." *Florida Bar,* 115 S. Ct. at 2378. The common sense link between alcohol advertising on billboards and consumption of alcohol by minors is self apparent. *Dunigan,* 718 F.2d at 750. *See also, Cal-Almond, Inc. v. United States Department of Agriculture,* 14 F.3d 429, 439 (9th Cir. 1993) ("The Supreme Court assumes as a matter of law that advertising increases consumption of the product or service being advertised.").

Cases relied upon by Petitioners, such as *Edenfield; City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410 (1993); *Ibanez v. Florida Dept. of Business and Professional Regulation,* 512 U.S. 136 (1994); *Rubin v. Coors Brewing Co.,* 115 S. Ct. 1585 (1995); and *44 Liquormart,* are all distinguishable from the instant case. Those cases did not involve, as this one does, a logical or common sense link between the speech restraint and the governmental interest sought to be advanced. In those cases, without evidence compensating for the lack of a logical or common sense link between the means and the ends, the efficacy of the speech restraint could be defended with nothing more than speculation.

This case does not provide a vehicle for re-examination of this Court's assumption, as a matter of law, that

advertising increases consumption. Baltimore relied on more than judicial notice and common sense to satisfy its burden; it relied on evidence placed before the court. The Fourth Circuit sustained Baltimore's law based on a legislative record containing much more than tidbits of evidence or speculation. The studies placed before the court below demonstrate that advertising of the type restricted by Baltimore's ordinance plays a unique and significant role in stimulating illegal consumption of alcohol by minors. As the Fourth Circuit observed:

> In the preamble to the ordinance, the City Council summarized its findings in support of the ordinance. The City Council found, for instance, that the consumption of alcoholic beverages is involved in at least one-half of all the major causes of death among youth and that about one-third of all juvenile males arrested said they had consumed alcohol within the previous 72 hours. In concluding that a connection exists between underage drinking and the widespread advertising of alcoholic beverages, the City Council found that alcoholic beverages are the second most heavily advertised products in America (after cigarettes), and that outdoor billboards are a "unique and distinguishable" medium of advertising which subjects the public to involuntary and unavoidable forms of solicitation. The City Council noted that children are exposed to the advertising of alcoholic beverages "simply by walking to school or playing in their neighborhood" and that children's "attitudes favorable to alcohol are significantly related to their exposure to alcohol advertisements." The City Council pointed to the Prevention Committee's report that the " 'overwhelming majority' of

> research studies showed a definite correlation between alcohol advertising and underage drinking" and concluded that "[a]n ordinance restricting the placement of advertisements for alcoholic beverages in publicly visible locations within Baltimore City is necessary for the promotion of the welfare and temperance of minors exposed to such advertisements." Attempting to tailor its ban, the City Council allowed advertising of alcoholic beverages in commercial and industrial areas, stating that it was "narrowly focus[ing] its efforts on those advertisements which most directly affect minors where they live, attend school, attend church and engage in recreational activities."

App., 20a.

Although this Court would find the legislative record supporting Baltimore's ordinance sufficient to satisfy Baltimore's burden under *Central Hudson*, it would not thereby clarify the law. *Cf., Florida Bar*, 115 S. Ct. at 2378 ("we do not read our case law to require that empirical data come to us accompanied by a surfeit of background information"). Thus, review of the determination of the lower court as to the sufficiency of the evidence adduced by Baltimore in support of its ordinance would not, respondents respectfully submit, be a prudent use of this Court's certiorari jurisdiction.

Petitioners treat the Fourth Circuit's decision as aberrant because it affirmed dismissal of their complaints pursuant to Fed. R. Civ. P. 12(b)(6). Petitioners do not dispute, of course, that the legislative record supporting Baltimore's ordinance was properly before the district

court and could be considered by that court in accordance with Rule 12(b)(6). *See* 5A Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* §1357 (1990) (in deciding Rule 12(b)(6) motions courts may consider matters of public record).

The district court's recourse to the legislative record supporting Baltimore's ordinance was no different from this Court's recourse (on a summary judgment motion) to the Bar study supporting the speech restraint upheld in *Florida Bar.* In *Florida Bar,* as in this case, once the reviewing court satisfied itself that the legislative record contained empirical support demonstrating the restraint would directly advance the government's purpose, the judicial inquiry under *Central Hudson's* third prong was concluded. *Cf., Turner Broadcasting,* 512 U.S. at 666 (judicial obligation to exercise independent judgment in First Amendment cases is not a license for court to reweigh the evidence *de novo.*).

The record in *Central Hudson* was far less factually developed than the record in the instant case. The Court determined, however, based on common sense, that the state's interest in energy conservation was directly advanced by a regulation prohibiting advertising that promoted the use of electricity. 447 U.S. at 569. As this Court observed, "the Commission adopted the restriction because it was *deemed likely* to 'result in some dampening of unnecessary growth' in energy consumption." *Id.* at 560 (quoting *Consolidated Edison Co. v. Public Service Comm'n.*, 47 NY2d 94, 101, 390 NE2d 749, 752 (1979)) (emphasis added). In deciding that the advertising restriction would lower demand for electricity, this Court

pointed to no record evidence, and, indeed, there was no such evidence to support the regulation.

B. The *Central Hudson* Fourth Prong

The final question under *Central Hudson* is whether the regulation is "more extensive than is necessary to serve [the governmental] interest." 447 U.S. at 566. In *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989), this Court held squarely that this inquiry does not amount to a "least restrictive means" test. Instead, this Court's decisions require

> a " 'fit' between the [government's] ends and the means chosen to accomplish those ends," a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served [ ]"; that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

Id. at 480 (citations omitted).

The Court has elaborated on this approach in subsequent decisions, but it has never retreated from *Fox's* firm rejection of a "least restrictive means" test. To the contrary, it has repeatedly reaffirmed that holding. *See, Edge*, 509 U.S. at 429-30, *Discovery Network*, 507 U.S. 410, 416-17 nn. 12-13 (1993); *Florida Bar*, 115 S. Ct. at 2380. Accordingly, a commercial speech restriction will fail the narrow-tailoring requirement only if it "burden[s] *substantially* more speech than necessary." *Edge*, 509 U.S. at

430 (emphasis added). The existence of "numerous and obvious less-restrictive alternatives" is a "relevant consideration," although not necessarily a dispositive one, in assessing the fit between the government's regulatory means and ends. *Discovery Network*, 507 U.S. at 417 n.13. Conversely, the continued availability of alternative channels to communicate the regulated speech weighs in favor of sustaining the regulation. *See, Florida Bar*, 115 S. Ct. at 2380-2381.[4]

Petitioners assert that the Fourth Circuit's "decision clashes most starkly with this Court's conclusion in *44 Liquormart* that the fourth prong was not satisfied because, like Baltimore here, Rhode Island had not first attempted to reduce abusive drinking by adopting the alternatives of educational programs and limiting access to alcohol beverages." Pet., 20a. Petitioners' argument

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[4] Petitioners mischaracterize when they assert that "[t]his Court has held repeatedly that the fourth prong *is not* met if there are 'obvious less-burdensome alternatives to the restriction on commercial speech.' " Pet., 19 (emphasis added). *See, Discovery Network*, 507 U.S. at 113 n. 13 (presence of numerous and obvious less-burdensome alternatives to the restriction on commercial speech is *"a relevant consideration* in determining whether the 'fit' between ends and means is reasonable") (emphasis added); *Florida Bar*, 115 S. Ct. at 2380 (same); *44 Liquormart*, 116 S. Ct. 1521 (O'Connor, J.) ("availability of less-burdensome alternatives to reach the stated goal signals that the fit between the legislature's ends and the means chosen to accomplish those ends *may* be too imprecise to withstand First Amendment scrutiny") (emphasis added).

Thus, Petitioners have built their conflict argument upon a mistaken characterization of the standard which actually obtains under the fourth prong.

proceeds from a misunderstanding of the basis for this Court's holding in *44 Liquormart,* and, more fundamentally, disregards obvious differences between this case and *44 Liquormart.*

In *44 Liquormart* the Court held that Rhode Island had failed to make the requisite showing because "alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the state's goal of promoting temperance." 116 S. Ct. at 1510 (Stevens, J.); *id.* at 1521-1522 (O'Connor, J.). In particular, the Court relied on Rhode Island's authority to raise the price of liquor directly, either through price regulation or taxation. *Id.* at 1510 (Stevens, J.); *id.* at 1522 (O'Connor, J.). Justice Stevens also noted that another alternative, an educational campaign directed against liquor consumption, "might" prove to be more effective than Rhode Island's indirect attempt to reduce consumption by prohibiting price advertising. 116 S. Ct. at 1510. He did not, however, conclude that an educational campaign in fact would be more effective, nor did he suggest that a state must undertake such a campaign before it can engage in commercial speech regulation.

While *44 Liquormart* makes clear that the availability of effective non-speech related regulatory alternatives is relevant to the final prong of *Central Hudson,* the decision does not hold that the bare existence of such alternatives will always be dispositive. *Central Hudson* and its progeny have never required the government to exhaust all conceivable regulatory alternatives to commercial speech restrictions. Tellingly, in *Edge* the Court sustained the federal restriction on broadcast lottery advertising under the fourth prong of *Central Hudson* without requiring a

showing that educational campaigns against gambling had been undertaken or would be ineffectual. That holding in *Edge* survives *44 Liquormart*.

Rhode Island's unconstitutional price advertising ban proceeded from the misguided and paternalistic assumption that adults would use truthful commercial information unwisely. Baltimore's law, on the other hand, proceeds from the compelling interest which the City asserts in protecting children from advertising which induces them to consume a product that they are prohibited by law from consuming. Direct criminalization, however, has proven ineffective in curbing underage drinking. Baltimore's law was enacted in support of the government's unambiguous commitment (backed by the criminal law) to zero tolerance of underage drinking, whereas Rhode Island's law was enacted as an indirect way for the state to affect drinking behavior without unambiguously committing itself to reducing alcohol consumption.

It is entirely legitimate under the First Amendment for the government to act "paternalistically" in order to protect children. *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 116 S. Ct. 2374, 2386 (1996) (for First Amendment purposes, "the protection of children is a 'compelling interest' "); *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989) (same); *Ginsburg v. New York*, 390 U.S. 629, 639-41 (1968) (same). As a result, the government may legitimately seek to protect children from the harmful effects of information that adults have a First Amendment right to see and hear. *See, e.g., Ginsburg*, 390 U.S. at 634-41 (state may prohibit sale of non-obscene materials to minors because "the

state has an interest 'to protect the welfare of children' and to see that they are 'safeguarded from abuses' ").

The impact which Baltimore's ordinance has on the ability of adults to receive alcohol advertising is not constitutionally significant in view of the many alternative channels of communication left unrestricted by the ordinance. *Florida Bar,* 115 S. Ct. at 2380-2381; *44 Liquormart,* 116 S. Ct. at 1521 (O'Connor, J.). As observed by the Fourth Circuit, Baltimore's ordinance "does not foreclose the plethora of newspaper, magazine, radio, television, direct mail, Internet, and other media available to Anheuser-Busch and its competitors." App., 7a.

Nor, despite their citation to *Discovery Network,* can Petitioners sustain their argument that Baltimore's ordinance is unconstitutionally underinclusive. The ban on commercial newsracks in that case was struck down because such newsracks were no greater an eyesore than the non-commercial newsracks which were left unregulated, thus establishing that Cincinnati drew a distinction between commercial and non-commercial speech which bore no relationship whatsoever to the particular interest the City had asserted. 113 S. Ct. at 1508-1509. It is otherwise as to the distinction between outdoor advertising and the many other channels of communication which Baltimore's ordinance leaves free from restriction. Long ago this Court recognized that billboards are a unique and distinguishable medium of advertising which subjects the general public to involuntary and unavoidable forms of solicitation. *Packer Corp. v. Utah,* 285 U.S. at 110. It is the tendency of billboards to be immune from all attempts at parental supervision which motivated Baltimore to restrict billboards in particular.

Similarly, Petitioners' underinclusiveness argument, based on the ordinance's disparate treatment of various types of outdoor advertisements for alcohol (Pet., 21), is foreclosed by *Metromedia* and *Edge*. In *Metromedia*, San Diego's billboard ordinance was attacked as impermissably underinclusive because of its failure to ban on-site as well as off-site advertising. This Court squarely rejected that argument: "[W]hether on-site advertising is permitted or not, the prohibition of off-site advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits on-site advertising." 453 U.S. at 511 (plurality opinion); *id.* at 551 (opinion of Stevens, J., concurring in part and dissenting in part).

Edge involved a federal statutory restriction barring radio broadcast of lottery advertisements by stations licensed in a non-lottery state. The purpose of the restriction was to protect state choice concerning lotteries. Edge Broadcasting Co. owned a station in North Carolina, a non-lottery state, but 92% of the station's audience was composed of residents from a populous city in nearby Virginia, a lottery state. Edge argued, and the lower courts held, that the advertising restriction was fatally underinclusive as applied to it because too much commercial speech about the Virginia lottery had been left unrestrained for the restriction to "directly advance" Congress' purpose. In rejecting that argument this Court held:

> We have no doubt that the fit in this case was a reasonable one. . . . [A]pplying the restriction to a broadcaster such as Edge directly advances

> the governmental interests. . . . *We think this would be the case even if it were true, which it is not, that applying the general statutory restriction to Edge, in isolation, would no more than marginally insulate the North Carolinians in the North Carolina counties served by Edge from hearing lottery ads.*

509 U.S. at 429-430 (emphasis added).

CONCLUSION

For the foregoing reasons, respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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No. 96-1428

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ANHEUSER-BUSCH, INC. and
PENN ADVERTISING OF BALTIMORE, INC.,
Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; CITY COUNCIL OF BALTIMORE CITY; and DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* RONALD D. ROTUNDA AND JOHN E. NOWAK IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, Ronald D. Rotunda and John E. Nowak (collectively "*Amici*") respectfully move for leave to file the attached brief as *amici curiae* in support of petitioners. Counsel for petitioners has consented to the filing of this brief, and his letter of consent is filed with the Court. Counsel for respondents has declined to consent to the filing of the brief. *Amici*, therefore, submit this motion.

Amici are both professors of law at the University of Illinois, College of Law. They have published and lec-

tured widely on constitutional law subjects and have co-authored a treatise on Constitutional Law. They submit this motion and brief on their own behalf, and not as representatives of the University of Illinois. *Amici* have been compensated by the petitioners for the time spent in preparation of this brief, although they have not been compensated for their views of the First Amendment issues which are based on principles they have set forth previously in their Treatise.*

Amici believe that this case presents the Court with an opportunity to examine the meaning of, and justification for, the *Central Hudson* test as a standard to be used by federal and state courts when reviewing regulations of commercial speech under the First Amendment to the Constitution of the United States, as applicable to the States through the Fourteenth Amendment. *Amici* are presenting the Court with relevant material not already before the Court because they have taken a global, jurisprudential approach to how the Court can best clarify the applicable constitutional standards, as opposed to the partisan view presented by the parties.

Amici further believe that clarification of the standards to be applied under *Central Hudson* is necessary, if not essential, in light of the Fourth Circuit's serious misunderstanding of the level of judicial review accorded governmental restrictions on commercial speech. Were the Fourth Circuit majority's opinion to remain unchanged, *Amici* would have to amend the commercial speech section of their treatise on constitutional law to account for the unique approach taken by the Fourth Circuit and to attempt to reconcile the Fourth Circuit's departure from this Court's previous commercial speech decisions.

---

* Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* (2d ed. 1992) (4 volumes with annual pocket parts). *See also* John E. Nowak & Ronald D. Rotunda, *Constitutional Law* (5th ed. 1995) (one volume hornbook of the four volume Treatise).

Ordinarily, *Amici* would wait until the Court granted the writ of certiorari before seeking to submit their brief. In this case, however, petitioners are seeking a summary reversal of the Fourth Circuit's judgment. Indeed, when this Court previously considered a petition for a writ of certiorari in this case, the Court did dispose of the cases summarily. *Anheuser-Busch, Inc. v. Schmoke,* 116 S. Ct. 1821 (1996) (petition granted, decision vacated, and cases remanded to the Fourth Circuit for reconsideration in light of *44 Liquormart v. Rhode Island,* 116 S. Ct. 1495 (1996)). It is possible, then, that *Amici* will not have an opportunity to present their views in support of a brief on the merits.

Because *Amici* offer a perspective different from any party on issues that are deserving of the Court's attention in this important case, *Amici's* brief will be of assistance to the Court. Accordingly, *Amici* respectfully request that they be allowed to participate in this case by filing the attached brief.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF *AMICI CURIAE* RONALD D. ROTUNDA AND JOHN E. NOWAK IN SUPPORT OF PETITIONERS

INTEREST OF AMICI

The interest of *amici curiae* Ronald D. Rotunda and John E. Nowak are set out fully in the Motion for Leave to File accompanying this brief.

STATEMENT

For many years this Court has granted First Amendment protection to what is often called "commercial speech." Both the state and federal governments have often accepted these decisions with extreme reluctance, as they have enacted new legislation that seeks to ban commercial speech to the fullest extent possible. In this case, the government seeks to prohibit truthful advertising about an admittedly lawful product, on a theory that has far-reaching implications. Can the government prohibit advertising directed to adults on the ground that it may be viewed by children? Does the state have the power to restrict the adult population to reading what is fit only for children? Equally significant is the issue whether the government has the power to keep truthful information from legal adult users of a product in order to manipulate their choices in the free market. If the government claims that its purpose of forbidding certain types of advertising is to keep people in the dark about the truth, that admission should spell the death knell for the restriction, not justify it.

This case presents the Supreme Court with the opportunity to resolve problems being faced by the lower courts in applying this Court's previous commercial speech decisions. Should the Court decide not to accept the case for full briefing and oral argument, the *amici* respectfully suggest that the Justices grant the alternative relief sought by petitioners, and summarily reverse the decisions of the United States Court of Appeals for the Fourth Circuit, and the District Court, so that the opinions of those courts cannot be used as precedent for the virtual elimination of First Amendment protection for commercial speech.

SUMMARY OF ARGUMENT

The decision of the United States Court of Appeals in this case both demonstrates the need for clarification

of the standards to be used by the judiciary in commercial speech cases, and provides an excellent vehicle for Supreme Court clarification of those standards. Moreover, this case is a particularly suitable vehicle because it was decided on the basis of a government motion for dismissal, and thus is uncluttered with unique facts that might make any ruling less useful to the state and federal courts that must deal with these questions.

When reviewing governmental restrictions of "political" or "noncommercial" speech, the judiciary requires the government to bear the burden of demonstrating that the prohibited speech falls within a category of speech that the Supreme Court has held may be punished consistently with the First Amendment, or that the restriction is necessary [narrowly tailored] to promote a "compelling interest." However, decisions of the Supreme Court of the United States concerning "commercial speech" have left lower courts uncertain as to: (1) whether truthful commercial speech receives lesser First Amendment protection than "noncommercial speech"; (2) the nature of the government's burden of demonstrating that a prohibition of truthful commercial speech is narrowly tailored to promote an important interest; (3) whether all speech that is identified with a corporation or business entity that is known for selling a specific product is "commercial speech;" and (4) whether the government may prohibit adults from reading truthful, nonmisleading information, because children might incidentally see this information.

The decisions of the Court of Appeals in this case, one of which followed a Supreme Court order remanding the case for reconsideration, demonstrate the confusion concerning the issues noted above. The Court of Appeals' decisions, and the procedural posture of the case, present the following issues:

First, when prohibiting truthful speech about a lawful product, what is the nature and extent of the govern-

ment's burden to demonstrate that the prohibition is narrowly tailored to promote an important government interest? The Court of Appeals' most recent opinion in this case demonstrates the confusion on this point. The Court of Appeals appears to have reversed the constitutionally required burden of proof, by employing a presumption of constitutionality for the ordinance, and requiring the speaker/advertiser to prove that the prohibition was not tailored to promote an important interest.

Second, may the government prohibit truthful advertising that is not targeted toward children, on the basis of "protecting children" with a regulation that, on its face, is not designed to restrict advertising targeted toward children?

ARGUMENT

I. THE BALTIMORE AND MARYLAND STATUTES AT ISSUE IN THIS CASE AND THE DISTRICT COURT'S GRANTING OF THE GOVERNMENT'S MOTION TO DISMISS, MAKE THIS CASE A NEAR PERFECT VEHICLE FOR CLARIFICATION OF COMMERCIAL SPEECH ISSUES THAT PRESENT GREAT DIFFICULTY TO LOWER COURTS

The *amici* are not so presumptuous, or pretentious, that they would waste the Justices' time with a recitation of the Supreme Court's commercial speech cases. Our analysis of the Court's commercial speech decisions appears in 4 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional law: Substance and Procedure* §§ 20.26-20.31 (2d ed. 1992 & 1997 Supp.). *See also* John E. Nowak & Ronald D. Rotunda, *Constitutional Law* §§ 18.6-18.31 (5th ed. 1995) (one volume hornbook of the four volume Treatise); Ronald D. Rotunda, *The Commercial Speech Doctrine in the Supreme Court,* 1976 U. Ill. L. Forum 1080.[1]

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[1] This article was cited in *Central Hudson Gas & Electric Corporation v. Public Service Commission,* 447 U.S. 557, 575 (1980). For further discussion of these issues, *see also* Ronald D. Rotunda,

Since 1980 the judiciary, in reviewing the constitutionality of restrictions of commercial speech, has employed the four-part test set forth in Justice Powell's majority opinion in *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 574 (1980). Some Justices have recently expressed doubts about the justification for, and the meaning of, the four-part test. *E.g.*, *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1515 (1996) (Scalia, J., concurring in part and in the judgment); 116 S. Ct. at 1515-16 (Thomas, J., concurring in part and in the judgment); *cf.* 116 S. Ct. at 1511-12 (Stevens, J., joined by Kennedy, Thomas, & Ginsburg, JJ.)

While any commercial speech case arising in the lower courts might provide the vehicle for reconsideration of the *Central Hudson* four-part test, the *Anheuser-Busch, Inc. v. Mayor and City Council of Baltimore City* case presents a particularly good fact situation for examining the meaning of, and justification for, the *Central Hudson* test.

In practice the *Central Hudson* four-part test results in a two step analysis. "First, a Court must determine whether the speech is truthful, nonmisleading speech concerning a lawful product." 4 Rotunda & Nowak, *supra*, at 194. The government, in this case, has never claimed that petitioners' billboard advertising contains fraudulent or factually misleading statements. The government has not attempted to demonstrate that the petitioners' billboard advertisements constitute an offer to sell alcoholic beverages to persons under the age of 21 (*i.e.*, that they are directed to persons under the age of 21) whose use of such products is prohibited by Maryland and Baltimore law. The Maryland enabling statute and the Baltimore ordinance at issue in this case allow signs and billboard-type advertisements for alcoholic beverages on buses,

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Professionalism, Legal Advertising, and Free Speech in the Wake of Florida Bar v. Went For It, Inc., 49 Ark. L. Rev. 703 (1997).

which may travel by schools, the Baltimore sports stadiums, frequented by many persons under the age of 21, or at establishments selling products containing alcohol on their premises, even if the establishment, and its signs, are visible from the windows of grade schools in the City.

Anheuser-Busch, Inc. v. Mayor and City Council of Baltimore City clearly presents only questions regarding what we have termed the second stage of commercial speech analysis. In the second stage of the analysis—after finding that the government regulation restricts non-misleading commercial speech concerning a lawful product—a court must determine whether the regulation at issue is narrowly tailored to directly advance a substantial government interest. As explained in *Board of Trustees of State University of New York v. Fox*, 492 U.S. 469, 477-81 (1989), the regulation must be narrowly tailored to promote the asserted governmental interest, in the sense that there must be at least a "reasonable fit" between restricted commercial speech and the government's asserted substantial interest. 4 Rotunda & Nowak, *supra*, at 194-96. This "reasonable fit" analysis does not involve a presumption of constitutionality for laws regulating truthful commercial speech, as does the rationality/reasonableness test used by the Supreme Court to review economic and social welfare legislation under the due process and equal protection clauses.

II. A CASE DECIDED IN THE GOVERNMENT'S FAVOR BASED ON A PRE-TRIAL MOTION TO DISMISS IS THE BEST TYPE OF CASE FOR THE SUPREME COURT'S CLARIFICATION OF THE BURDEN OF PROOF IN COMMERCIAL SPEECH CASES

Both before and after the *Central Hudson* case, almost all of the decisions of the Supreme Court concerning commercial speech indicate that the government must demonstrate to the court that there is a factual basis for finding the "reasonable fit" between the type of commercial

speech prohibited or restricted by the statute and the government's substantial interest. For example, in *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 95 (1977) (footnote omitted). Justice Marshall's opinion for an unanimous Court stated: "The record here demonstrates that respondents [the government] failed to establish that this ordinance [banning residential "for Sale" signs] is needed to assure that Willingboro remains an integrated Community [the government's asserted interest]."

Similarly, in *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416 (1993) (citations & footnotes omitted), Justice Stevens' majority opinion stated: "It was, therefore, proper for the District Court and the Court of Appeals to judge the validity of the city's prohibition [of newsracks for commercial handbills] under the standard we set forth in *Central Hudson* and *Fox*. It was the city's burden to establish a 'reasonable fit' between its legitimate interests in safety and esthetics and its choice of a limited and selective prohibition of newsracks as the means chosen to serve those interests."

The District Court's opinion in *Anheuser-Busch, Inc. v. Mayor and City Council of Baltimore City*, set forth as appendix D to the petitioners' petition for a writ of certiorari, reads the Supreme Court's decisions in *Edenfield v. Fane*, 507 U.S. 761 (1993) and *United States v. Edge Broadcasting*, 509 U.S. 418 (1993), as affirming "the role of judicial deference to legislative judgments in the area of commercial speech." [2]

The first opinion of United States Court of Appeals, affirming the District Court decision,[3] stated that a governmental entity would meet its burden in justifying a prohibition of commercial speech "[i]f it appears to the

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[2] This passage appears on page 47a of the petition.

[3] Set forth as appendix C to the petition.

court that the legislative body could reasonably have believed, based on data, studies, history, or common sense" that the law promoted a legitimate interest.[4] Because the District Court had decided the case without the parties having the opportunity to present evidence at trial, the Court of Appeals was, in reality, absolving the government from having to demonstrate the reasonable fit required by *Central Hudson, Linmark,* and *Discovery Network.* The Supreme Court then remanded this case to the Court of Appeals for reconsideration in light of *44 Liquormart, Inc. v. Rhode Island. Anheuser-Busch, Inc. v. Schmoke,* 116 S. Ct. 1821 (1996).

The final opinion of the Court of Appeals is set forth in Appendix A to the Petition. The Court of Appeals' majority opinion shows the difficulty that lower courts face when trying to reconcile the statements in most of the Supreme Court's commercial speech cases, which place the burden of proof on the government, with the statements in a few cases, such as *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328 (1986), which can be read as granting great deference to a legislative decision to ban truthful commercial speech. In footnote "*" of the majority opinion, the Court of Appeals states "we do not continue to rely on *Posadas* . . . we do not defer blindly to the legislative rationale, but rather agree with it based on our independent conclusion. . . ."[5] Despite that passage, the Court of Appeals, by a two to one vote, decided that it should once again affirm the District Court's ruling despite the fact that there had been no trial, or other hearing, at which the government was required to produce facts to support its conclusion. At a trial or hearing at which the government bore the burden of demonstrating a reasonable fit between its asserted interest in protecting minors and its regulations, the petitioners could have brought to the trial court's attention

[4] This passage appears on page 25a of the petition.

[5] This passage appears on page 3a of the petition.

the fact that the government provided no data to support its particular law—the government only offered references to studies showing a general correlation between advertising and consumption [a point we will address in Part III, *infra*.].

The difficulty the lower courts are currently having in explaining the nature of the government's burden of proof in commercial speech cases can be demonstrated by contrasting the decision of the Fourth Circuit, in the present case, with the decision of the Ninth Circuit in *Valley Broadcasting Co. v. United States*, 1997 WL 76254 (9th Cir. Feb. 25, 1997). In *Valley Broadcasting*, the Ninth Circuit took the position that the Supreme Court's decisions required the government to prove that a prohibition of truthful commercial advertisements for casino gambling directly promoted the asserted governmental interests. The panel of the Fourth Circuit, in the present litigation, took the position that the government met its burden to justify a prohibition of truthful commercial speech, without presenting evidence, and without a trial, as long as the court found that there was a reasonable argument in support of the challenged law. The standard employed by the Fourth Circuit appears to be the "minimum scrutiny" standard used for the judicial review of economic and social welfare legislation under the due process and equal protection clauses. In contrast, the Ninth Circuit understood this Court's First Amendment decisions to require the government to present facts at trial that would prove that its commercial speech prohibition met all prongs of the *Central Hudson* four-part test.

The granting of the petition for a writ of certiorari in the present case will give the Supreme Court the opportunity to clarify the government's burden of proof in justifying a prohibition of commercial speech without the danger of having its explanation of the standard complicated by, or "tied up with," unique facts that would be demonstrated at a trial. The Court can use this case to

explore the nature of the government's burden to justify prohibitions of commercial speech, and to consider what if any deference should be given to laws regulating commercial speech. The case could then be remanded to the Court of Appeals, and District Court, for reconsideration in light of the clarified standard. Assuming the lower court properly applied the clarified standard, there should then be no need for the Supreme Court to review this particular case again.

III. THE BALTIMORE ORDINANCE CLEARLY RAISES THE IMPORTANT ISSUE OF WHETHER A GOVERNMENT ENTITY MAY IMPOSE A GENERAL BAN ON TRUTHFUL ADVERTISING REGARDING A PRODUCT THAT IS LAWFUL FOR ADULTS, BUT NOT MINORS, TO USE; OR, ALTERNATIVELY, WHETHER A GOVERNMENT PROHIBITION OF COMMERCIAL SPEECH, WHICH THE GOVERNMENT ASSERTS IS DESIGNED TO PROTECT MINORS, MUST, AT LEAST TO SOME EXTENT, BE TAILORED TO RESTRICT ADVERTISING AIMED AT MINORS

The present case provides an excellent vehicle for Supreme Court consideration of the interplay between the government's power to protect children and its power, consistent with the First Amendment, to restrict advertising to adult consumers. At the present time the lower courts have no guidance from the Supreme Court regarding how to analyze a government ban on advertising of products that are lawful for use by adults only. In the area of obscenity and pornography the Supreme Court has given guidance to the lower courts regarding the scope of governmental power to protect minors. A government entity may prohibit the distribution, sale, or showing of sexually explicit material to children that is unfit for minors to see, under defined community standards, even though the material is not obscene and, therefore, could not be totally banned. *Ginsberg v. New York*, 390 U.S. 629 (1968). Nevertheless, the government may not

prohibit a book store from stocking any book that is unfit for minors (but not adults), because that ban would violate the First Amendment by its restriction of the availability to adults of sexually related, but non-obscene, books and magazines. *Butler v. Michigan*, 352 U.S. 380 (1957) (holding that Michigan violated free speech when it reduced the adult population to reading what is fit only for children).[6]

The *amici* have long agreed with the second Justice Harlan that some, if not all, First Amendment cases can be best analyzed by first eliminating some topics that are not at issue in the case. *See, e.g., Cohen v. California*, 403 U.S. 15, 18 (1971); Daniel A. Farber & John E. Nowak, *Justice Harlan and the First Amendment*, 2 Constitutional Commentary 425 (1985). *Anheuser-Busch, Inc. v. Mayor and City Council of Baltimore City* is an important case because it does not involve advertising aimed at minors. Whether a governmental entity could prohibit corporations selling products containing alcohol, which is lawful for adults, but not minors to use, from using cartoon characters in their ads may be an interesting question, but it is not involved in this case. Neither Baltimore, nor Maryland [which enacted the enabling statute authorizing the Baltimore ordinance] has claimed that the banned billboard advertisements for alcohol related products are targeted at minors, because such a claim would be patently false.

The ordinance, and the state statute that authorizes it, have literally no relationship to reducing alcohol consumption other than the assertion that a reduction in the total volume of alcohol related advertising will [for reasons unexplained, as well as unproven] reduce illegal alcohol use by minors. The Baltimore Ordinance does not prohibit all signs advertising alcohol products. The

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[6] *See* Ronald D. Rotunda, *Commercial Speech and the Platonic Ideal: Libre Expression et Libre Enterprise, in, Freedom of Expression and the Charter* 319 (David Schneiderman ed., 1991).

ordinance exempts a wide variety of such advertising. *Among the many exemptions from the ban are*: advertisements on commercial vehicles that transport products containing alcohol; "any sign"—other than billboards—"for which zoning Board approval . . . is required;" "any sign on an MTA vehicle or taxicab;" "any sign on property owned, leased or operated by the Maryland Stadium Authority" or "any sign at Memorial Stadium." The exempted signs are as likely, or more likely, to be seen by children than are the signs referring to alcohol that are prohibited by the ordinance. Children can look out their school windows at advertisements for products containing alcohol on buses, taxis, and trucks that make the products containing alcohol products attractive. Children, under the Baltimore ordinance, can be exposed to any number of advertisements for products containing alcohol at the baseball stadium in Baltimore, and in signs at places where products containing alcohol are sold, but petitioners are banned from having signs that have not been designed to promote sales to children in any way.

The government offered only its mere assertion that reduction in advertising will reduce consumption by a particular group of people. The city's limitations on advertising may well *increase* alcohol consumption, by making alcohol into a "forbidden fruit." For example, marijuana and cocaine are not advertised, and yet high school (and even grade school) students have no problem buying these illegal substances. If the city believes that advertising is so powerful (notwithstanding famous examples to the contrary, such as the inability of advertising to sell the Edsel), then the city could engage in advertising itself. Thus, the city could broadcast advertisements about the dangers of alcohol consumption, especially by the young. Rather than seeking to silence truthful speech about a lawful product, the city could exercise its right to engage in free speech. We should never forget that the normal response to speech that one does not like is *more speech, not less.*

Moreover, if the city is really concerned about alcohol consumption, there are non-speech ways to reduce alcohol consumption by those underage. Federal rules now require sellers of tobacco to ask for identification if the purchaser looks younger than 27 years of age. The city could impose similar rules on the sale of alcohol. Such rules would be more narrowly tailored than the present assault on free speech.

The theory that restrictions on truthful advertising of lawful products are permissible if they are effective in manipulating the adults who purchase the products is contrary to the central principle of democracy. The theory that the government can prohibit adults from reading truthful advertising because children might also see it is a theory so broad that it swallows up virtually all protection for commercial speech. The ruling of the Court of Appeals presents the real danger that expressions of concern about the illegal use of alcohol by minors [or any other product that is lawful for adults, but not for minors to purchase] can justify a total ban on truthful advertising of lawful products.

The Baltimore and Maryland laws are no more tailored to the prevention of the use of alcohol by minors than were the statutes that were stricken by the Supreme Court in *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995) and *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495.[7] Both the Federal Government, in *Rubin*, and the Rhode Island Government, in *44 Liquormart*, could have made the same assertion as Baltimore, which in essence is: "if we ban all, or at least a lot of, ads for products containing alcohol, kids won't use alcohol illegally." The lower courts need to learn from the Supreme Court whether

[7] Indeed, the Baltimore ordinance is so poorly drafted that, on its face, it may ban signs with public service announcements because they carry the name of a business entity that is identified with the production and sale of products containing alcohol.

that assertion is, or is not, in itself enough to save such laws. Granting the petition for certiorari in *Anheuser-Busch, Inc. v. Mayor and City Council of Baltimore City* will allow the Supreme Court to provide needed guidance on this issue to legislatures considering restricting advertising of lawful products that may be harmful if used by children, and to the courts that will have to review the constitutionality of such laws.

CONCLUSION

For the reasons stated above, the *amici* respectfully submit that the Supreme Court should grant a writ of certiorari in *Anheuser-Busch, Inc. v. Mayor and City Council of Baltimore City*.

If the Justices do not believe that this case should be fully briefed and argued in the Supreme Court, the *amici* respectfully request the Supreme Court to grant petitioners' alternative request for relief by summarily reversing the decisions of the United States Court of Appeals for the Fourth Circuit and the District Court. If the decisions of those courts are not reversed, or reviewed by the Supreme Court, lower courts throughout the nation may believe that they should follow the lead of the Fourth Circuit and refuse to engage in meaningful review of laws prohibiting commercial speech.

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MOTION FILED
APR 10 1997

No. 96-1428

(4)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

ANHEUSER-BUSCH, INC., and
PENN ADVERTISING OF BALTIMORE, INC.,

Petitioners,

—v.—

MAYOR and CITY COUNCIL OF
THE CITY OF BALTIMORE, *et. al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF NATIONAL ADVERTISERS, INC., IN SUPPORT OF PETITIONERS

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Counsel for Association of National Advertisers, Inc., as Amicus Curiae

12 pp

Motion for Leave to File Brief *Amicus Curiae* in Support of Petitioners

1. Pursuant to Supreme Court Rule 37.2(b), the Association of National Advertisers, Inc. (ANA) respectfully moves for leave to file the annexed brief *amicus curiae* in support of petitioners' application for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit. Petitioners have consented to the filing of this brief. Respondents have declined to grant consent. The last day to file a brief in opposition herein is April 10, 1997.

2. ANA is the industry's oldest trade association, and the only organization exclusively dedicated to serving the interests of businesses that advertise regionally and nationally. ANA's membership is a cross-section of American industry, consisting of manufacturers, retailers and service providers. Representing more than 5,300 separate advertising entities, ANA's member companies market a kaleidoscopic array of products and services to consumers and other businesses.

3. As the nation's principal community of commercial speakers, ANA has long been committed to the advancement of commercial speech designed to permit consumers to make informed and autonomous choices in the marketplace. ANA has appeared as *amicus curiae* in this Court in numerous cases involving commercial speech, and, with the consent of all parties, has filed briefs *amici curiae* in support of petitioners in the Fourth Circuit and in connection with this Court's earlier consideration of this case.

4. ANA is mindful of the nature of a motion for leave to file a brief *amicus curiae* at the certiorari stage. The First Amendment issues affecting ANA members raised by the petition in this case are, however, so critical to the continued viability of constitutionally protected commercial speech that *amicus* participation at the certiorari stage appears appropriate, despite the refusal of respondents to grant consent.

Accordingly, counsel respectfully moves for leave to file the annexed brief *amicus curiae* in support of petitioners' application for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Dated: New York, New York
April 9, 1997

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Reasons for Granting the Writ

The courts below refused to permit the development of the factual record needed to assess Baltimore's claim that a massive program of content-based censorship of lawful speech aimed at adults is necessary to protect children. Accordingly, *amicus* respectfully requests the Court to grant a writ of certiorari, summarily reverse the decision below, and remand the case to the District Court to permit the development of the factual record needed to assess the important First Amendment issues raised herein.

I. THE COURTS BELOW FAILED TO PERMIT THE DEVELOPMENT OF THE FACTUAL RECORD NEEDED TO ASSESS THE IMPORTANT FIRST AMENDMENT CLAIMS RAISED HEREIN

Despite repeated warnings from this Court that content-based efforts to ban truthful commercial speech about a lawful product must be based on a substantial factual showing of necessity and efficacy, the Fourth Circuit persisted in refusing to remand this matter to the District Court to permit the development of a record testing the factual justification for Baltimore's massive exercise in censorship. 101 F.3d 325 (4th Cir. 1996).

The District Court, relying upon now-discredited dicta in *Posadas de Puerto Rico Assoc. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986), dismissed petitioners' complaint without affording petitioners an opportunity to challenge the factual underpinnings of Baltimore's decision to impose severe restrictions on outdoor advertising of beverages containing alcohol. The District Court deemed judicial fact-finding unnecessary, since, under *Posadas*, it elected to defer wholly to the conclusory "findings" of the Baltimore City Council, announced after one day of so-called "hearings". 855 F. Supp 11 (D. Md. 1994). The Fourth Circuit, also relying on

Posadas, affirmed the District Court's refusal to permit a factual hearing. 63 F.3d 1305 (4th Cir. 1995). After this Court's partial repudiation of *Posadas* in *44 Liquormart v. Rhode Island*, 116 S.Ct. 1495 (1996), this Court vacated the Fourth Circuit's decision, and remanded the matter to the Fourth Circuit for reconsideration. 116 S.Ct. 1821 (1996). A divided panel of the Fourth Circuit, with Judge Butzner dissenting, once again refused to remand the matter to the District Court to permit the development of a factual record. The panel's majority reasoned that, even after the partial repudiation of *Posadas* in *44 Liquormart*, it was unnecessary to subject Baltimore's assertion that a far-reaching ban on outdoor advertising of beverages containing alcohol is necessary to protect children to serious factual scrutiny by the courts. Rather, the panel below persisted in deferring to the findings of the Baltimore City Council, without permitting those findings to be challenged in an adversary proceeding.

At no time during these proceedings have the factual underpinnings of Baltimore's decision to embark on a massive scheme of content-based censorship been subjected to meaningful scrutiny in a court of law. Instead of the searching judicial review of the factual justification for content-based censorship that is a hallmark of the modern First Amendment, the panel of the Fourth Circuit below, in disregard of repeated holdings of this Court, asked merely whether the Baltimore City Council had articulated a facially plausible justification for its decision to impose massive, content-based censorship. Eg. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993); *Edenfield v. Fane*, 507 U.S. 761 (1993); *Ibanez v. Florida Dep't of Business and Professional Regulation*, 114 S.Ct. 2084 (1994).

But the heart of modern First Amendment protection is a rigorous, independent review by the judiciary of the factual underpinnings of any decision to censor protected speech. Eg. *Turner Broadcasting System, Inc., v. FCC* 114 S.Ct. 2445 (1994); *Landmark Communications, Inc,. v. Virginia*, 435 U.S.

829 (1978). As this Court held in *Turner Broadcasting I*, the judiciary is obliged to conduct an independent review of the legislature's factual basis for censorship in order to assure that First Amendment rights are adequately preserved, even when such an independent review brings the judiciary into conflict with Congress. The Court's intense commitment to serious judicial scrutiny of the factual basis for censorship was reaffirmed in each of the opinions in *Turner Broadcasting System v. FCC*, 117 S.Ct. ____, 65 USLW 4209 (March 31, 1997) (*Turner Broadcasting II*). While members of the *Turner Broadcasting II* Court disagreed over whether the government's extensive factual showing was sufficient, all agreed that appropriate resolution of the First Amendment issues required careful attention to a factual record developed in the context of an adversary judicial proceeding. Unfortunately, the courts below abdicated their responsibility to develop a record testing the factual basis for Baltimore's massive exercise in censorship. 63 F.3d at 1311-12. Instead, the court below asked merely whether the Baltimore City Council could have held a rational belief that its censorship scheme had a "logical nexus" to the problem of underage drinking. *Id* at 1313-1314. But such an unduly deferential "rational basis" standard confuses judicial review of censorship of speech with judicial review of the regulation of behavior and has been explicitly rejected by this Court in commercial speech cases. See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993); *Edenfield v. Fane*, 507 U.S. 761 (1993); *Ibanez v. Florida Dep't of Business and Professional Regulation*, 114 S.Ct. 2084 (1994).

II. BALTIMORE APPEARS TO HAVE IMPERMISSIBLY USED A LEGITIMATE CONCERN FOR CHILDREN AS A PRETEXT TO IMPOSE WIDESPREAD CENSORSHIP ON THE ENTIRE COMMUNITY

The refusal of the courts below to permit serious exploration of the factual underpinnings of Baltimore's speech ban is particularly disturbing because, as Baltimore concedes, its sole basis for censorship is the alleged impact of outdoor advertising—no matter what its content; no matter what its location—on children. Thus, Baltimore asserts the power to engage in massive censorship of lawful speech directed at adults on the basis of an ostensible belief that the speech is harmful to children, without subjecting the factual underpinnings of that belief to judicial scrutiny in an adversary proceeding. The net result has been massive censorship of adults, with no serious factual inquiry into whether widespread censorship is actually necessary to protect children, or whether less drastic approaches exist that would permit delivery of the speech to adults while adequately protecting children.

Amicus recognizes the significant societal interest in protecting children. It is no coincidence that many of the difficult free speech issues of our time involve efforts to regulate speech directed at adults in the name of protecting children. Whether one is concerned with sexually explicit speech on the Internet, violence on television, or billboards in Baltimore, the First Amendment challenge is the same—to assure that legitimate concern for children does not inadvertently ripen into a blueprint for the widespread censorship of adults. Eg. *Butler v. Michigan*, 352 U.S. 380 (1957); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983); *Sable Communications Co. v. F.C.C.*, 492 U.S. 115 (1989).

The best—perhaps the only—way to lessen the tension between a robust First Amendment and an understandable desire to shield children from allegedly harmful speech is meticulous attention to facts. Under the Courts' jurispru-

dence, a claim that otherwise lawful speech harms children must be proven in a court of law, not merely asserted at a legislative hearing. Similarly, a claim that widespread, prophylactic censorship of adults (as opposed to a more narrowly targeted protective device) is necessary to protect children must be factually demonstrated, not merely asserted. But Baltimore's pervasive censorship scheme cannot be defended on grounds of either efficacy or necessity because it is both over- and under-inclusive. While *amicus* does not believe that persuasive data exists identifying outdoor advertising as a material cause of underage drinking,[1] even if one assumes for the sake of argument that some children might be unduly influenced by certain outdoor advertisements, no factual basis exists to propose an over-inclusive ban on all off-site outdoor advertisements for alcohol in Baltimore's residential neighborhoods.

Conversely, the inexplicable underinclusiveness of Baltimore's censorship scheme reinforces the suspicion that concern with children is being used as a cover for censorship of adults. A censorship scheme genuinely designed to protect children simply would not exempt advertisements in Camden Yards and Memorial Stadium, or on public transportation. The internal contradictions of a censorship scheme that claims to protect children by *exempting* advertisements in ballparks, in downtown shopping malls, and on the buses children ride to school makes it all but impossible to take Baltimore's child protection rationale seriously. *Rubin v. Coors Brewing Co.*, 115 S.Ct. 1585 (1995). See also *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

Unfortunately, the lax procedural approach endorsed by the panel of the Fourth Circuit below—an approach that is affirmatively hostile to judicial fact-finding—makes it impossible

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[1] In 1985, the Federal Trade Commission rejected the identical argument, finding that no persuasive data linked advertising to underage abuse of alcohol. The FTC study, among others, is described in the Joint Appendix submitted to the Fourth Circuit. JA 175-76; 1177-78.

to conduct the serious judicial inquiry needed to prevent an ostensible concern for children from becoming a convenient Trojan Horse for pervasive censorship of the society at large. It is possible, as Judge Butzner noted below, that, despite a contrary finding by the Federal Trade Commission in 1985, Baltimore will be successful in demonstrating that all forms of outdoor advertising for beverages containing alcohol, regardless of content or location, actually do function as a material cause of underage drinking. Moreover, on remand, it is possible that Baltimore will be successful in demonstrating that nothing short of a massive restriction on outdoor advertising will adequately protect children; while, at the same time, defending the rationality of exempting ball parks, shopping malls, and school buses from the ban.

Thus far, however, Baltimore has been permitted to impose its censorship scheme without subjecting its factual assertions about necessity and efficacy to judicial review in an adversary proceeding. Such a casual approach to First Amendment judicial fact-finding simply cannot be squared with this Court's repeated reminders that careful assessment of the factual underpinnings of censorship is the heart of the modern First Amendment.

Conclusion

Accordingly, *amicus* respectfully suggests that the panel decision below be summarily reversed on the basis of Judge Butzner's dissent, and the matter remanded to the District Court for the development of a factual record that will make it possible to assess Baltimore's censorship scheme using reason, not mere intuition.

Dated: New York, New York
April 9, 1997

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IN THE
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OCTOBER TERM, 1996

ANHEUSER-BUSCH, INC., *et al.*,
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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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IN THE
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MOTION FOR LEAVE TO FILE BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioners. Counsel for Petitioners has consented to the filing of this brief. Counsel for Respondents has declined to consent to the filing of the brief, thereby necessitating the filing of this motion.

WLF is a nonprofit public interest law and policy center with supporters in all 50 states. While WLF engages in litigation in a variety of areas, WLF devotes a substantial portion of its resources to protecting the right of commercial free speech. To that end, WLF has appeared before this Court as well as other federal and state courts in cases raising commercial speech issues. *See, e.g., 44 Liquormart, Inc. v. Rhode Island,* 116 S. Ct. 1495 (1996); *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585 (1995); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993); *Peel v. Attorney Registration and Disciplinary Comm'n of Illinois,* 496 U.S. 91 (1990). WLF also filed a brief in support of the certiorari petition filed by Petitioners the last time this case came before the Court. *Anheuser-Busch, Inc. v. Mayor and City Council of Baltimore City,* 116 S. Ct. 1821 (1996) (*petition granted, vacating and remanding* 63 F.2d 1305 (4th Cir. 1995)).

WLF is concerned that the Fourth's Circuit's rationale in this case, if followed widely by lower courts and other circuits, could lead to widespread denial of commercial speech rights. The Fourth Circuit's approach to the third and fourth prongs of the *Central Hudson* test not only upheld a content-based ban on expression, but did so without even a minimal opportunity for Petitioners to engage in discovery and to present evidence.

WLF has no direct interest in the outcome of this case, other than an interest in establishing the principle that the First Amendment rights of commercial speakers should be broadly construed. Accordingly, WLF believes that it brings to the case a perspective that differs from that of any party, and that its brief will be of assistance to the Court in deciding this case.

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that it be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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April 9, 1997

QUESTION PRESENTED

Does the deferential standard of review in commercial speech cases, articulated in *Posadas v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) -- whereby courts defer to legislatures' predictive judgments regarding the effects of commercial speech restrictions -- survive this Court's opinion in *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996)?

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INTERESTS OF *AMICUS CURIAE*

The interests of *amicus curiae* Washington Legal Foundation (WLF) are set out fully in the Motion for Leave to File accompanying this brief.

STATEMENT OF THE CASE

In the interests of brevity, WLF hereby incorporates by reference the Statement contained in Petitioners' brief.

In brief, Baltimore City in 1994 enacted an amendment to its zoning law (the "Ordinance") which bans (with numerous exceptions) outdoor advertising of alcohol beverages in most areas of the city. The Ordinance's stated purpose is to reduce illegal underage drinking. Exempted from the ban are, among other locations, the windows and exteriors of retail alcohol beverage outlets and the exteriors of public buses, taxicabs, and alcohol beverage delivery trucks. Petition Appendix ("Pet. App.") 66a-79a. Nor does the Ordinance limit other forms of advertising commonly used for alcohol beverages (*e.g.*, television, radio, newspapers, and magazines).

Petitioners Anheuser-Busch, Inc. and Penn Advertising of Baltimore, Inc. in 1994 filed separate lawsuits seeking, *inter alia,* to enjoin enforcement of the Ordinance on First Amendment grounds. Petitioners then filed motions for preliminary injunctions, to which they attached evidence intending to show that the Ordinance would not directly and materially reduce underage consumption of alcohol beverages. Respondents (referred to herein collectively as "Baltimore City") responded by filing motions to dismiss the actions under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief could be granted.

Without notice to the parties, the U.S. District Court for the District of Maryland converted Baltimore City's motions to summary judgment motions and granted them. The district court ruled that it was required to defer to Baltimore City's conclusion that the Ordinance would di-

rectly lead to a material reduction in underage drinking. Pet. App. 40a-63a.

On appeal, the U.S. Court of Appeals for the Fourth Circuit affirmed, finding that dismissal of the actions was appropriate under Rule 12(b)(6). Pet. App. 16a-39a. *Anheuser-Busch I.* The Fourth Circuit held that a government an demonstrate that a commercial speech restriction survives *Central Hudson* scrutiny by relying solely on "legislative facts" -- that is, factual determinations made by the government during the course of "the enactment itself and its legislative history." Pet. App. 26a. Moreover, the appeals court held, these legislative facts are not subject to judicial review, even under a "clearly erroneous" standard, because doing so would intrude on the prerogatives of the legislative branch. *Id.* Based on the Ordinance's legislative facts (such as Baltimore City's conclusion that there is a strong correlation between advertising and increased underage drinking, a "fact" disputed in studies submitted by Petitioners), the court determined as a matter of law that the Ordinance passed the third prong of the *Central Hudson* test, because "it was reasonable for the Baltimore City Council to have concluded that [the Ordinance's] regulation of the outdoor advertising of alcoholic beverages directly and materially advances Baltimore's interest in promoting the welfare and temperance of minors." *Id.* at 31a.

The Fourth Circuit held that the Ordinance also survived *Central Hudson*'s fourth prong -- that the Ordinance be "not more extensive than necessary to serve the stated governmental interest." *Id.* at 33a. The court held that alternatives suggested by Petitioners (including increased enforcement of the ban on sales to minors and increased education regarding the risks of alcohol consumption) could not be considered more narrowly tai-

lored means of achieving Baltimore's purpose, which (the court *now* held) was "curbing the enticement to consume alcoholic beverages." *Id.* at 34a. The court held that the Ordinance was narrowly tailored as a matter of law in the absence of evidence that alternative plans would have a lesser impact on adults' exposure to alcohol beverage advertising while at the same time matching the reduction in juveniles' exposure achieved under the Ordinance. *Id.*

Following the Court's decision in *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996), the Court granted Petitioners' petition for a writ of certiorari, vacated the Fourth Circuit's judgment, and remanded the cases to the Fourth Circuit for reconsideration in light of *44 Liquormart*. Pet. App. 15a.

On remand, the Fourth Circuit (by a 2-1 vote) "re-adopted" its prior opinion and again affirmed the district court's dismissal. Pet. App. 1a-14a (*Anheuser-Busch II*). In doing so, the appeals court's one caveat was that -- in light of *44 Liquormart*'s criticism of this Court's prior decision in *Posadas v. Tourism Co. of Puerto Rico*, 478 U.S. 328 (1986) -- it was no longer relying on *Posadas*. *Id.* at 3a n.*. (*Anheuser-Busch I* had relied heavily on *Posadas* in determining the appropriate level of review.)

The appeals court distinguished *44 Liquormart* by arguing that that case involved a far more extensive speech restriction. The court noted that Baltimore had banned only one form of alcohol advertising (billboards in most areas of the city) and had targeted only those individuals prohibited from purchasing alcohol beverages, while in *44 Liquormart* Rhode Island had banned alcohol price advertising "in any form whatsoever" and had targeted *all* consumers including "legal users." *Id.* at 4a-7a. The appeals court also held

that Baltimore's focus on protecting children and juveniles served to distinguish the Ordinance from the law struck down in *44 Liquormart* because this Court has "repeated[ly] recogni[zed] that children deserve special solicitude in the First Amendment balance because they lack the ability to assess and analyze fully the information presented through commercial media." *Id.* at 8a. The court held that the Ordinance actually fostered First Amendment values because "far from undermining the free dissemination of information to independently choosing consumers, Baltimore's ordinance supports the full development of its young so that they will be able to assess their market options intelligently and independently." *Id.*

Finally, the Fourth Circuit also attempted to distinguish *44 Liquormart* by arguing that the Ordinance qualifies as a "time, place, or manner" speech restriction because it permits outdoor advertising of alcohol beverages at some locations and because it permits Petitioner Anheuser-Busch to advertise its products via other media. *Id.* at 7a.

Judge Butzner dissented from the panel's decision; he would have remanded the cases for evidentiary hearings. Pet. App. 10a-14a. Judge Butzner argued that the courts could not, in the absence of a fully developed factual record, determine whether the Ordinance could survive scrutiny under the third and fourth prongs of the *Central Hudson* test.

REASONS FOR GRANTING THE WRIT

I. THE FOURTH CIRCUIT'S DEFERENTIAL APPROACH TO COMMERCIAL SPEECH RESTRICTIONS IS UNTENABLE AFTER *44 LIQUORMART*

The burden is on the government to justify regulation of commercial speech that concerns a lawful activity and is not misleading. *Edenfield v. Fane,* 113 S. Ct. 1792, 1800 (1993). A municipality must: (1) demonstrate a substantial interest in support of its regulation; (2) demonstrate that the regulation advances that interest "in a direct and material way"; and (3) demonstrate that the regulation is narrowly tailored -- *i.e.,* that the restriction on commercial speech "is in reasonable proportion to the interest[] served." *Id.* at 1798. As the Fourth Circuit correctly recognized, the dispute in this case revolves around whether Baltimore has proper justification for its Ordinance under the latter two of those factors -- commonly known as the third and fourth prongs of *Central Hudson*'s four-prong standard of review for commercial speech.

The Fourth Circuit, in determining in *Anheuser-Busch I* that the Ordinance met the *Central Hudson* test for the restriction of commercial speech, stated:

> There is a *logical nexus* between the City's objective and the means it selected for achieving that objective, and it is not necessary, in satisfying *Central Hudson*'s third prong, to prove conclusively that the correlation exists, or that the steps undertaken will solve the problem. . . . The proper standard for approval must involve an assessment of the *reasonableness* of the

> legislature's *belief* that the means it selected will advance its ends.

Pet. App. 31a. On this basis, the Fourth Circuit refused to consider even the barest contrary evidence that Petitioners submitted.

In interpreting *Central Hudson*'s standard as one requiring only a "logical nexus" and a "reasonable belief" that the means will directly and materially advance the end, the Fourth Circuit reduced the *Central Hudson* test from one of "intermediate scrutiny" to one of mere "rational basis" review, as evidenced by its refusal to even look at the proffer of contrary, compelling evidence on the preliminary injunction motions. Such an approach flies in the face of this Court's pronouncements regarding the proper review of commercial speech regulations: the legislature is required to "demonstrate that the harms it recites are real and that a restriction will in fact alleviate them to a material degree." *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1592 (1995)(quoting *Edenfield*, 113 S. Ct. at 1800). *See also Ibanez v. Florida Dep't of Business & Professional Regulation*, 114 S. Ct. 2084, 2089 (1994).

Any doubt about the exacting standard of review required for commercial speech restrictions was eliminated by *44 Liquormart*. Indeed, *Anheuser-Busch I*'s deferential standard of review was derived almost entirely from *Posadas*, a decision effectively overruled in pertinent part by *44 Liquormart*. As Justice Stevens (writing for himself and Justices Kennedy, Thomas, and Ginsburg) explained in *44 Liquormart:*

> Our commercial speech cases recognize some room for the exercise of legislative judgment. *See Metromedia,*

> *Inc. v. San Diego,* 453 U.S. 490, 507-508 (1981). However, Rhode Island errs in concluding that *Edge* [*United States v. Edge Broadcasting Co.,* 509 U.S. 418 (1993)] and *Posadas* establish the degree of deference that its decision to impose a price advertising ban warrants. . . .
>
> Because the 5-to-4 decision in *Posadas* marked such a sharp break from our prior precedent, and because it concerned a constitutional question about which this Court is the final arbiter, we decline to give force to its highly deferential approach.
>
> Instead, in keeping with our prior holdings, we conclude that a state legislature does not have the broad discretion to suppress truthful, nonmisleading information for paternalistic purposes that the *Posadas* majority was willing to tolerate.

44 Liquormart, 116 S. Ct. at 1511. Justice O'Connor (writing for four other Justices) agreed. *Id.* at 1522. There is no allegation that Petitioners' advertising contains anything other than truthful, nonmisleading information; Baltimore City seeks to suppress it solely because of the City's belief that those under 21 would be better off not being exposed to it. Accordingly, the Fourth Circuit clearly erred in *Anheuser-Busch I* and *II* when it concluded that Baltimore City's "reasonable belief" that the Ordinance would directly and materially advance the goals of promoting the welfare and temperance of minors was sufficient to immunize the Ordinance from attack under the *Central Hudson* test's third prong.

The Fourth Circuit's analysis of *Central Hudson*'s fourth prong was equally faulty. The appeals court simply

refused to consider Petitioners' two suggested alternatives for achieving Baltimore City's goals, alternatives that did not involve regulating speech. Pet. App. 33a-34. Justifying that refusal required significant judicial sleight-of-hand; where previously the City's legislative goals had been identified as promoting the welfare and temperance of youth, now the goal was identified as "curbing the enticement" for underage drinking. *Id.* Obviously, the only way to curb enticements is to suppress speech; such suggested alternatives as stricter enforcement of the underage sales ban almost surely (as the Fourth Circuit conceded) would reduce underage drinking, but the Fourth Circuit deemed them insufficiently comparable to the Ordinance because they would do nothing to curb enticements for underage drinking. *Id.* However, Baltimore City has never identified as its legislative goal a desire to eliminate truthful, nonmisleading speech because one effect of that speech might be to entice those under 21 to drink alcohol beverages. Rather, Baltimore City's goal has been to reduce underage drinking, and thus Petitioners were improperly prohibited from discovering and presenting evidence that the goal could be equally well achieved without resorting to speech restrictions.

The Fourth Circuit attempted in *Anheuser-Busch II* to bolster its initial decision by suggesting that First Amendment scrutiny be relaxed when commercial speech restrictions are designed for the protection of children. The appeals court stated:

> This decision thus conforms to the Supreme Court's repeated recognition that children deserve special solicitude in the First Amendment balance because they lack the ability to assess and analyze fully the information presented through the commercial media.

Pet. App. 8a.

Even if the panel is correct that there exists a "special solicitude in the First Amendment balance" that permits otherwise impermissible speech restrictions to be imposed in the name of child welfare,[1] that conclusion does not obviate the need for courts to subject all commercial speech restrictions to the four-pronged analysis set forth in *Central Hudson*. A speech restriction is not immunized from judicial review based simply on legislative assertions that the restriction will materially advance the cause of child welfare; *44 Liquormart* makes clear that, when challenged, government regulators must demonstrate that their speech restrictions materially advance their stated objective (regardless how noble the objective) and do so in a narrowly tailored manner. The cases cited by the appeals court -- which deal almost exclusively with FCC broadcast restrictions -- lend no support to the panel's contention that close scrutiny of speech restrictions is unnecessary when the government is seeking to protect children.

Anheuser-Busch II's analysis of *44 Liquormart* makes little sense when one considers that Rhode Island, as does

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[1] WLF notes that the Court has declined other invitations to reduce, in certain classes of cases, the exacting level of review normally applied to commercial speech restrictions. The Court has declined, for example, to relax the level of review when the product being advertised is alleged to constitute a vice. *See Rubin v. Coors Brewing Co.*, 115 S. Ct. at 1590-91 n.2; *44 Liquormart*, 116 S. Ct. at 1513 (Stevens, J.). Moreover, the Court has rejected broad commercial speech bans even when their purpose was to protect children from the speech, noting that under the First Amendment the "government may not reduce the adult population . . . to reading only what is fit for children." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 73-74 (1983).

Maryland, prohibits the purchase of alcohol beverages by those under 21. The Court was willing to accept Rhode Island's contention that a price advertising ban leads to *some* reduction in consumption (albeit not necessarily a *material* reduction), *44 Liquormart,* 116 S. Ct. at 1509, and by extension presumably would also have accepted a contention that a price advertising ban serves to reduce consumption among all age groups, including those under 21. Yet, it is difficult to believe that the unanimous *44 Liquormart* court would have reversed its decision if Rhode Island had merely announced that its price advertising ban was designed to reduce underage drinking. Accordingly, Baltimore City's expressed goal of protecting those under 21 does not serve to distinguish this case from *44 Liquormart*; at the very least, *44 Liquormart* requires that Petitioners be permitted an opportunity to gather and present evidence that the Ordinance will not materially advance the cause of child welfare and is not narrowly tailored to achieve that goal.

The straying of the Fourth Circuit from this Court's commercial speech review standards is not unique and thus merits plenary review. Since *Central Hudson,* lower courts have exhibited some confusion regarding the third and fourth prongs and the requisite level of review. The Ninth Circuit has applied a relatively strict level of review in such cases. *Nordyke v. Santa Clara County,* ___ F.3d ___, 1997 U.S. App. LEXIS 6303 (9th Cir. 1997). The Fifth and Tenth Circuits, on the other hand, appear to share at least some of the Fourth Circuit's willingness to grant the legislative branch considerable deference in commercial speech cases. *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 747 (5th Cir. 1983), *cert. denied,* 467 U.S. 1259 (1984); *Oklahoma Telecasters Ass'n v. Crisp*, 699 F.2d 490

(10th Cir. 1983), *rev'd on other grounds sub nom. Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).

The deferential approach to commercial speech restrictions has reached its nadir here. The Fourth Circuit's Rule 12(b)(6) dismissal of Petitioners' First Amendment challenge to a regulation of protected commercial speech is apparently without precedent. Indeed, the Fourth Circuit rejected the slightly-less-deferential approach of the district court, which had at least tried to give a paltry semblance of fairness by converting the Rule 12(b)(6) motion to one for summary judgment. WLF therefore respectfully urges this Court to grant certiorari for purposes of clarifying how the lower courts should exercise the scrutiny required under *Central Hudson* and how governments seeking to regulate commercial speech can meet the burden of proof imposed by *Central Hudson.*

II. THE ORDINANCE MAY NOT BE DEFENDED AS A "TIME, PLACE, OR MANNER" RESTRICTION ON SPEECH, BECAUSE IT IS NOT CONTENT-NEUTRAL

In *Anheuser-Busch II,* the Fourth Circuit attempted to shore up its analysis by asserting for the first time that the Ordinance is valid as a "time, place, or manner" restriction on speech. Pet. App. 7a. That assertion is without merit; the Ordinance does not qualify as a "time, place, or manner" speech restriction because it is not content-neutral, and this Court has never indicated a willingness to import into commercial speech cases the deferential standard of review employed in "time, place, or manner" cases when examining legislative findings.

The Court has explained "time, place, or manner" speech restrictions as follows:

> [T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of information.

Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Nonviolence,* 468 U.S. 288, 293 (1984).

Regardless whether Baltimore City could demonstrate that it can meet the second and third requirements of a valid "time, place, or manner" restriction on speech (narrow tailoring and alternative channels for communication), Baltimore clearly cannot meet the content-neutrality requirement. The Ordinance is not content-neutral under any commonsense definition of that term: it prohibits some outdoor signs and permits others based solely on their content. The Fourth Circuit thought that the Ordinance qualified as a time, place, or manner restriction because Baltimore City does not altogether ban outdoor advertising of alcohol beverages but rather limits the number of places where such signs can be posted; and also because Baltimore City permits advertising of alcohol beverages through other media. Pet. App. 7a. But in the absence of evidence that Baltimore City imposes similar "place" restrictions on commercial signs advertising other types of products, the Ordinance cannot be said to be "content-neutral" and thus cannot be upheld as a "time, place, or manner" restriction.

Indeed, the Court rejected a very similar "time, place, or manner" argument in *Linmark Assoc. Inc. v. Township of Willingboro,* 431 U.S. 85 (1977). *Linmark* involved an ordinance prohibiting the display of "for sale" signs on the front lawns of private residences. The Court held that the ordinance could not be defended as a "time, place, or manner" speech restriction because the municipality did not prohibit display of other types of signs on front lawns -- and thus the ordinance failed the content-neutrality requirement. *Linmark,* 431 U.S. at 93-94.

In their brief in opposition to the petition, Respondents cite to several of the Court's "time, place, or manner" decisions and "*O'Brien* content-neutral" decisions[2] to support the Fourth Circuit's contention that the courts should defer to legislative findings regarding the effectiveness of commercial speech restrictions in furthering the legislature's goals. *See, e.g.,* Respondents' Brief at 7 (*citing Turner Broadcasting System, Inc. v. FCC [Turner I],* 512 U.S. 622 (1994)). But the Court has never indicated that the deference afforded legislatures in cases involving "time, place, or manner" speech restrictions or "*O'Brien* content-neutral" restrictions has any place in cases involving content-based commercial speech restrictions. Indeed, in an "*O'Brien* content-neutral" decision issued just last week, the Court repeatedly emphasized that the substantial deference it was affording to congressional findings regarding the cable television industry would not

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[2] In "*O'Brien* content-neutral" decisions, the Court has held that a content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests. *See United States v. O'Brien,* 391 U.S. 367, 377 (1968).

have been granted had the speech restrictions at issue not been content-neutral. *Turner Broadcasting System, Inc. v. FCC [Turner II]*, ___ U.S. ___, 65 U.S.L.W. 4209, 4211 (March 31, 1997); *id.* at 4222 (Stevens, J., concurring)("If this statute regulated the content of speech rather than the structure of the market, our task would be quite different."); *id.* at 4222-23 (Breyer, J., concurring in part). Respondents' reliance on *Turner I* misses the mark for the additional reason that *Turner I* deferred to legislative findings to a far lesser extent than did the Fourth Circuit in this case. The Fourth Circuit held that Respondents were entitled to dismissal under Rule 12(b)(6) even before Petitioners were given an opportunity to gather and present evidence. By way of contrast, despite ruling that substantial deference should be afforded the congressional findings at issue, *Turner I* vacated a judgment against those raising First Amendment challenges and remanded the case to permit them to engage in additional factfinding.

In sum, the Fourth Circuit's invocation of the "time, place, or manner" doctrine as an additional ground for upholding the Ordinance is a significant misapplication of that doctrine. The Court should grant the petition for certiorari in order to correct that error.

CONCLUSION

Amicus curiae Washington Legal Foundation respectfully requests that the Court grant the Petition.

Respectfully submitted,

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No. 96-1428

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ANHEUSER-BUSCH, INC. and PENN ADVERTISING OF BALTIMORE, INC.,
Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; CITY COUNCIL OF BALTIMORE CITY; and DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITIONERS' REPLY BRIEF

INTRODUCTION

Civil rights are meaningless unless they can be enforced. The decision of the Fourth Circuit majority profoundly threatens all commercial speech rights because it renders powerless the sole enforcer of those rights, the judicial branch. Based on its view of separation of powers, the Fourth Circuit majority held that government's asserted justification for content-based censorship may not be subjected to "judicial review under a clearly erroneous standard or otherwise." App., *infra*, 26a. That holding conflicts directly with this Court's commercial speech decisions, which require the judiciary to hold government to

a substantial burden of proof. This petition should be granted because, as Baltimore cannot deny in its opposition brief, the Fourth Circuit majority's decision leaves commercial speakers with nowhere to turn for meaningful protection of their First Amendment rights.

In another conflict with this Court's decisions, the Fourth Circuit majority also posited that the First Amendment applies with less rigor when government claims to be restricting speech in order to protect children. Baltimore chose to address this "special solicitude" issue only obliquely in its brief. Nonetheless, the petition should also be granted to clarify that this Court's decisions in the indecency area do not require a reduction of First Amendment scrutiny in the commercial speech context when the government asserts a goal of child protection.

REPLY TO RESPONDENTS' ARGUMENTS

I. BALTIMORE DOES NOT DISPUTE THAT THE FOURTH CIRCUIT'S DECISION, IF LEFT STANDING, WILL RESULT IN THE ROUTINE DISMISSAL OF COMMERCIAL SPEECH CHALLENGES AT THE PLEADING STAGE

Baltimore does not dispute that the decision of the Fourth Circuit majority provides a road map to any government that wants to impose content-based restrictions on commercial speech without fear of judicial invalidation. The legislature need only craft a self-serving preamble to its speech restriction, reciting its belief that the restriction will directly and materially advance its asserted goal. The speech restriction would then be insulated from a First Amendment challenge because, in the majority's view, legislative conclusions that purportedly satisfy the *Central Hudson* test cannot be "trumped by the fact finding apparatus of a single court." App., *infra,* 26a. If this were the law, the judicial branch would have no role in protecting commercial speech rights, as the courts would be obliged to accept as true the legislative branch's purported justification for its censorship. The proverbial fox,

in the form of majoritarian legislative bodies, would be guarding the First Amendment chicken coop.

The Fourth Circuit majority's virtual elimination of the judicial branch from its role as guardian of the First Amendment conflicts directly with this Court's decisions. This Court's commercial speech decisions are a product of meaningful judicial review of the evidentiary record proffered by a government to satisfy the *Central Hudson* test and by the challenger to refute the government's showing. *See, e.g., 44 Liquormart, Inc. v. Rhode Island,* 116 S. Ct. 1495 (1996); *Florida Bar v. Went For It, Inc.,* 115 S. Ct. 2371 (1995); *United States v. Edge Broadcasting Co.,* 509 U.S. 418 (1993); *Edenfield v. Fane,* 507 U.S. 761 (1993); *City of Cincinnati v. Discovery Network, Inc.,* 507 U.S. 410 (1993). On a more fundamental level, this Court has emphasized the critical role of the judicial branch in reviewing speech restrictions that, like the Ordinance, are content-based, because of the danger that the national discourse will be distorted by majoritarian suppression of disfavored or less popular ideas. *See Police Dep't of Chicago v. Mosley,* 408 U.S. 92, 95-96 (1972); *United States v. Associated Press,* 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd,* 326 U.S. 1 (1945); *see also Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 771 (1976).

Rather than acknowledge this conflict, Baltimore mouths the Fourth Circuit majority's claim that it somehow made an "independent assessment" of the factual issues raised by the *Central Hudson* test. Brief in Opp. at 6-7 (*quoting* App., *infra,* 4a); *see* App., *infra,* 3a n.*. It is not possible, however, that the majority made such an "independent assessment" because these cases were terminated on Rule 12(b)(6) motions, with no opportunity for petitioners to contest in court the Baltimore City Council's legislative "findings" or submit contrary evidence. The majority's acceptance of Baltimore's self-serving preamble to the Ordinance as irrebuttable fact belies its claim that it made

the "independent assessment" required by this Court's decisions.[1]

Clearly, the majority's decision directly conflicts with this Court's decisions with respect to the role of the judicial branch in protecting commercial speech rights. This overarching conflict in constitutional theory permeates the three more practical, subsidiary conflicts with this Court's decisions, discussed below, concerning how the courts should apply the *Central Hudson* test.

A. The Dismissal under Rule 12(b)(6)

The Fourth Circuit majority's dismissal of petitioners' well-pleaded complaints under Rule 12(b)(6) conflicts with this Court's repeated statements that the government, not the challenger, bears the burden of proof under *Central Hudson*. *See, e.g., Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1592 (1995). Baltimore does not contest that the majority's approach will result in the routine dismissal of commercial speech challenges on the pleadings without any opportunity for the challengers to test the

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[1] The inadequacy of the Fourth Circuit majority's "assessment" is illuminated by contrasting it with this Court's recent decision in *Turner Broadcasting System, Inc. v. F.C.C.*, 1997 WL 141375 (Mar. 31, 1997) (*Turner II*), a case involving a content-neutral restriction on speech, which Baltimore's restriction on alcohol beverage advertising most assuredly is not. *See id.* at *25 (Stevens, J., concurring) (noting that if the must-carry rules "regulated the content of speech rather than the structure of the market, our task would be quite different."). The must-carry rules at issue were first considered by the Court in *Turner Broadcasting System, Inc. v. F.C.C.*, 114 S. Ct. 2445 (1994). There, the Court remanded the case to the district court for a "more substantial elaboration" of the "predictive or historic evidence" upon which the government relied to justify its restriction. *Id.* at 2471. On remand, the district court conducted 18 months of additional proceedings during which it considered extensive evidence proffered by the parties, including "expert submissions, sworn declarations and testimony, and industry documents." *Turner II*, 1997 WL 141375 at *5. Only after the district court had reviewed that "expanded record" did this Court conclude that judicial findings could be made under the level of scrutiny appropriate to a content-neutral restriction on speech. *Id.* at *9.

government's "proof" or submit contrary evidence. Instead, Baltimore attempts to defend the majority's Rule 12(b)(6) approach, but succeeds only in underscoring its conflict with this Court's decisions, including *Florida Bar*.

Baltimore mistakenly contends that the majority's Rule 12(b)(6) dismissal is "no different from" this Court's decision in *Florida Bar*: "In *Florida Bar*, as in this case, once the reviewing court satisfied itself that the legislative record contained empirical support demonstrating the restraint would directly advance the government's purpose, the judicial inquiry under *Central Hudson*'s third prong was over." Brief in Opp. at 11. To the contrary, this Court in *Florida Bar*, after considering the legislative record, took the additional step of "scouring the record" made in court for contrary evidentiary submissions from the plaintiffs—but found none. 115 S. Ct. at 2378; *see* Petition at 15-16 (quoting relevant language from *Florida Bar*). In stark contrast, the Fourth Circuit majority's decision to proceed under Rule 12(b)(6) precluded petitioners from making any evidentiary submissions in defense of their speech rights.[2]

The Fourth Circuit majority's Rule 12(b)(6) approach conflicts with this Court's First Amendment jurisprudence (*see Discovery Network*, 507 U.S. 410, 418-19), the Federal Rules of Evidence (*see Daubert v. Merrell Dow*

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[2] As another theory for blocking the development of a contested evidentiary record, Baltimore suggests in its Questions Presented (but never elaborates in its brief) that the courts must judicially notice legislative findings that purportedly justify a restriction on commercial speech as "legislative facts." *See* App., *infra*, 26a. Petitioners submit that the factual inquiries raised by *Central Hudson*'s third and fourth prongs are properly characterized not as "legislative facts," but as "adjudicative facts," which are the "ultimate facts in the case, plus those evidential facts that are sufficiently central to the controversy that they should be left to the [trier of fact] unless clearly indisputable." 21 Charles A. Wright & Kenneth W. Graham, *Federal Practice & Procedure* § 5103 at 478 (1977 & Supp. 1995); *see* Fed. R. Evid. 201(a) advisory committee's note.

Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993)), and Rule 12(b)(6) itself, which requires that the allegations in a well-pleaded complaint must be accepted as true on a motion to dismiss (*see Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). Petitioners respectfully urge the Court to review the majority's decision because, left untouched, it would encourage other courts to cut off First Amendment challenges regardless of what is alleged in a complaint and without any testing of the government's "proof."

B. The Third Prong: Direct and Material Advancement

Baltimore also does not dispute that a conflict exists between the Fourth Circuit majority's decision and this Court's recent decisions concerning the third prong of *Central Hudson*. This Court requires a government to demonstrate "in fact" that its restriction on speech "directly and materially" advances its asserted purpose. *Rubin*, 115 S. Ct. at 1592. Government cannot satisfy that burden based solely on the superficial "reasonableness" of its beliefs. *44 Liquormart*, 116 S. Ct. at 1511 (Stevens, J.); *id.* at 1522 (O'Connor, J.). In conflict with this Court's holdings, the Fourth Circuit majority required Baltimore to show only that it "reasonably" believed that a "logical nexus" exists between its restriction and its asserted purpose. App., *infra*, 29a, 31a. Instead of addressing that conflict, Baltimore argues the merits of these cases, and in so doing, reinforces the importance of granting this petition to clarify the duty of the judiciary under the third prong.

In a premature effort to show this Court that it satisfied the third prong, Baltimore offers the same lengthy recitation of the legislative history of its Ordinance that was relied on by the majority. Brief in Opp. at 9-10. But that legislative history, and particularly what is missing from it, further underscores the majority's misunderstanding of its duty under *Central Hudson*. Nowhere in that history is there any evidence of how the Ordinance, with its myriad exemptions, in fact will affect the exposure of Baltimore's

minors to outdoor advertising for alcohol beverages.[3] Nor is there any evidence concerning the extent to which Baltimore's minors will continue to be exposed to alcohol beverages in every other advertising medium and in the social settings of contemporary life. Because the majority did not have before it any evidence on these issues, its decision cannot possibly be harmonized with this Court's decisions that require the judiciary to hold the government to a "demonstration in fact" standard of proof under the third prong. *See Rubin*, 115 S. Ct. at 1592.

In a further attempt to deny the conflict created by the Fourth Circuit majority's decision, Baltimore claims that the majority was permitted to use "common sense" to find that the government had satisfied the third prong. Brief in Opp. at 8, 11-12. But it is certainly not "common sense" that reducing minors' exposure to some outdoor advertising for alcohol beverages, while leaving untouched all other alcohol beverage advertising—including advertising on government-owned MTA buses and in Baltimore's stadiums—and social influences, will directly and materially reduce illegal underage consumption. *See 44 Liquormart*, 116 S. Ct. at 1509 (Stevens, J). Further, even if such an attenuated cause-and-effect relationship made sense intuitively to the two judges in the majority, their process conflicted with this Court's established practice of allowing challengers of First Amendment restrictions to submit evidence that might belie "common sense" assumptions. *See* Petition at 15. In short, the majority's "reasonable belief" approach to the third prong cannot be

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[3] Resolution of the third prong inquiry requires evidence on the effects of not only the exemptions contained in the Ordinance itself, but also the later enacted exemption for signs on the exterior surfaces of the more than 1,500 retail establishments located throughout Baltimore's neighborhoods. JA108. In its brief, Baltimore mistakenly asks this Court to disregard that exemption on the grounds it was not mentioned in the complaints or considered by the courts below. Brief in Opp. at 1. In fact, the exemption, which was not passed until after the complaints were filed, was the subject of extensive argument in petitioners' briefs to the Fourth Circuit both before and after this Court's remand.

reconciled with this Court's *Edenfield* standard, and that conflict alone merits the granting of the petition.

C. The Fourth Prong: No More Extensive Than Necessary

Baltimore does not dispute that this Court requires judicial scrutiny under the fourth prong of "obvious less-burdensome alternatives to the restriction on commercial speech." *Discovery Network*, 507 U.S. at 417 n.13; *see 44 Liquormart*, 116 S. Ct. at 1510 (Stevens, J.); *id.* at 1519-20 (Thomas, J.); *id.* at 1521-22 (O'Connor, J.); *Florida Bar*, 115 S. Ct. at 2380; *Rubin*, 115 S. Ct. at 1593-94. Nor does Baltimore claim that the Fourth Circuit majority engaged in such scrutiny. *See* App., *infra*, 35a. Instead, Baltimore makes the "strawman" argument that the availability of non-speech-restrictive alternatives, although concededly relevant under the fourth prong, is not always dispositive. Brief in Opp. at 13-14. But the issue on this petition is not whether the availability of such alternatives ultimately will prove to be dispositive in these cases. Rather, the issue is whether a court can refuse to require government to make any showing as to why it did not adopt obvious non-speech-restrictive alternatives, and deny plaintiffs any opportunity to contest the government's showing, particularly where the court itself recognizes that the alternatives "might indeed prove beneficial" in advancing the government's purpose. *See* App., *infra*, 34a.

In its response, Baltimore improperly conflates two distinct speech issues by suggesting that its failure to adopt less burdensome alternatives is "not constitutionally significant" because its restriction leaves open alternative channels of communication between alcohol beverage marketers and adult consumers. Brief in Opp. at 13, 16. Baltimore claims that this argument is supported by Justice O'Connor's opinions in *Florida Bar* and *44 Liquormart*, but those opinions contain no suggestion that government can avoid its obligation to consider non-speech-restrictive alternatives simply by limiting its speech restriction to one medium. If Baltimore were correct, then govern-

ment could censor commercial speech one medium at a time without any regard for the fourth prong of *Central Hudson*.

This petition should be granted to clarify the burden on government under the fourth prong. Petitioners submit that courts must do more than blindly accept unsubstantiated claims, such as those made by Baltimore, that government had no choice but to censor speech because obvious, non-speech-restrictive alternatives have "proven ineffective." *See* Brief in Opp. at 15. The Fourth Circuit majority's radical rewriting of the fourth prong to eliminate enforcement of the government's burden of proof is of vital importance to all commercial speakers and their audiences.

II. BALTIMORE MAKES NO ATTEMPT TO ADDRESS THE CONFLICT WITH THIS COURT'S DECISIONS CREATED BY THE FOURTH CIRCUIT'S RULE OF "SPECIAL SOLICITUDE" FOR A RESTRICTION ON SPEECH THAT IS PASSED FOR THE ASSERTED PURPOSE OF PROTECTING CHILDREN

Tellingly, Baltimore offers no real response to petitioners' argument that this Court also should resolve the conflict created by the Fourth Circuit majority's conclusion that a speech restriction must receive "special solicitude" from the courts if the legislature claims to have passed it for the purpose of protecting children. App., *infra*, 8a. That conclusion conflicts directly with this Court's decisions, which invariably hold that a legislature's asserted interest in protecting children cannot diminish judicial scrutiny of a speech restriction that affects communication between adults. *See Sable Comms. of Calif., Inc. v. F.C.C.*, 492 U.S. 115 (1989); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983); *Butler v. Michigan*, 352 U.S. 380 (1957).

This Court should grant the petition to clarify whether its decisions in the indecency area stand for the proposition, assumed by the Fourth Circuit majority, that a new category of speech protection has emerged, a category

that depends not on the content of the speech, but on the nature of government's asserted goal. In the majority's view, government need only assert that its goal is the protection of children, and its restriction on speech will receive diminished First Amendment scrutiny. By granting this petition, the Court will provide critical guidance to the many courts and legislatures that are, or soon will be, considering the conditions under which speech may be restricted for the ostensible purpose of protecting children.

CONCLUSION

The petition for a writ of certiorari should be granted and full briefing ordered. Alternatively, the judgment below should be summarily reversed and these cases should be remanded with instructions to permit discovery and a subsequent evidentiary hearing on the merits.

Respectfully submitted,

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